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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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JOHN E. RUST,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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PAUL E. WATTS & GERALD E. MORAN
of
WATTS and MORAN
2411 "M" Street
Omaha, NE 68107
402-733-7766

Attorneys for Petitioner

## QUESTIONS PRESENTED

1. Was the imposition of the death penalty in the Petitioner's case a violation of the Eighth and Fourteenth Amendments to the United States Constitution where the evidence established that Petitioner's co-defendant shot and killed Michael Kellogg?

2. Was the Nebraska Supreme Court's failure to apply the benefits of L.B.711 to Petitioner a violation of his right to due process and equal protection as guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States?

3. Was Petitioner denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

4. Does the imposition and carrying out of the death sentence for the crime of murder under the laws of Nebraska violate the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?

5. Did the trial court error by over-ruling defense counsel's objection to the comments made by the prosecutor during his closing argument regarding Petitioner's choice not to testify?

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PETITION FOR WRIT OF CERTIORARI
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The Petitioner, John E. Rust, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Nebraska, entered in this proceeding on March 20, 1981, Rehearing denied May 13, 1981.

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OPINION BELOW

The opinion of the Supreme Court of the State of Nebraska in the case of John E. Rust is reported at Neb., 303 N.W. 2d 490 (1981), attached as Appendix A. Also attached as Appendix B is the opinion regarding Petitioner's first appeal to the supreme court which is reported at 197 Neb. 528, 250 N.W. 2d 876 (1977).

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves Article VI, and the Fourth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, §9 of the Nebraska Constitution.

2. The case involves the following provisions of Nebraska law. (Appendix C):

Neb. Rev. Stat. 1943 §29-303
Neb. Rev. Stat. 1943 §29-2519 - 29-2525.
Neb. Rev. Stat. 1943 §29-2521.01 - 2521.04.
Neb. Rev. Stat. 1943 §29-2522.
Neb. Rev. Stat. 1943 §29-2523.
Neb. Rev. Stat. 1943 §29-2524.

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## STATEMENT OF THE CASE

Petitioner was arrested on February 21, 1975, and charged with the crimes of felony murder and three counts of shooting with intent to kill, wound or maim. On October 30, 1975, John E. Rust was convicted by a Douglas County District Court Jury and given the death sentence on the murder charge and 16 2/3 to 50 concurrent years on the three other charges. His conviction was affirmed on direct appeal to the Nebraska Supreme Court on February 9, 1977. The Petitioner's request for Rehearing was denied by an Order entered on March 18, 1977. Thus, action was brought pursuant to Nebraska's Post Conviction Law, Neb. Rev. Stat. §29-3001, et. seq.

Neither Rust nor his co-defendant, Ronald Ell, had testified at trial in the District Court. Just prior to the hearing for Post Conviction Relief, Ronald Ell informed Rust's lawyer that he, not Rust, had actually shot and killed Michael Kellogg. (8:13 - 15:6, 48:6-50:3). The court, informed of Ell's confession, allowed the Motion for Post Conviction Hearing to be amended. The addition included the argument that the sentence of death received by Rust for the killing of Kellogg violated the Eighth and Fourteenth Amendments' constitutional prohibition against cruel and unusual punishment (770:1-24). On September 20, 1979, the District Court of Douglas County, Nebraska, entered an Order denying Post Conviction Relief.

This conviction was appealed to the Nebraska Supreme Court, which affirmed the conviction and sentence on March 20, 1981. Petitioner's Motion for Rehearing was denied on May 13, 1981.

Petitioner moved for and was granted additional time to file this Petition on May 13, 1981, giving Petitioner until July 13, 1981.

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REASONS FOR GRANTING THE WRIT

I. THE IMPOSITION OF THE DEATH PENALTY IN PETITIONER'S CASE VIOLATES THE CONSTITUTIONAL PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

A. To permit Petitioner's death sentence to stand, is to violate the cruel and unusual punishment clause because the evidence establishes that Ronald Ell, rather than John Rust, shot and killed Michael Kellogg.

In 1976, this Court held that "the punishment of death does not invariably violate the constitution." Gregg v. Georgia, 428 U.S. 153, 169 (1976). However, it is essential that when a defendant's life is at stake, every possible safeguard be observed. Id. at 187. The prospect of the inevitable possibility that human error or a denial of due process could send the wrong man to his death is indeed sobering.[1] The"beyond a reasonable doubt" burden of proof is intended to protect the innocent, but it is no guarantee. Petitioner's case illustrates such a horrifying possibility.

In State v. Rust, 197 Neb. 528, 250 N.W. 2d 867 (1977), Ronald Ell, Rust's co-defendant, received a life sentence upon the court's belief that he was merely an aider and abetter in the killing of Michael Kellogg. It is Petitioner's contention that the Nebraska Supreme Court erred in holding that Ell's confession to the killing of Michael Kellogg at the Post Conviction Hearing was uncorroborated and without merit. To the contrary, the physical evidence introduced in this case supports the fact that Ell's testimony is corroborated on every point. Because of the unusual nature of this issue, Petitioner believes that a brief synopsis of the most notable substantiated testimony is necessary at this point.

[1] See, Black, "The Crisis in Capital Punishment," 31 MD L. Rev. 290, 295-300 (1971).

It is Petitioner's contention that Ell's credibility may be deduced from all the corroborating evidence in this case. Of greatest significance, is the fact that there was no physical possibility that the path of the bullets which struck Michael Kellogg could have occurred in any manner other than the manner in which Ronald Ell claims. Dr. Jerry Jones, the State's pathologists, testimony regarding the wounds Kellogg received and the bullets path of entry and exit of the body is consistent with Ell's testimony. There is also evidence which confirms the affirmation by Ell that he and Rust switched guns during the shooting episode.

During the hearing, the court questioned Ell regarding the number of rounds that had been fired from his gun prior to the exchange with Rust. The court ended its interrogation of Ell by acknowledging that the court was in error (88:8 - 89:8).

In Woodson v. North Carolina, 428 U.S. 280 (1976), this Court urged that there is an increasing need for reliability in the determination that death is the appropriate punishment in a specific case. Id. at 305. Any confidence that the proper sentence has been imposed in the case at bar evaporates, where, during oral argument the Assistant Attorney General concedes that "Ell was not where we thought he was originally." If, indeed, the facts as originally presumed were shown to be incorrect at the Post Conviction Hearing, there can be no assurance that death is the proper sentence.

To permit the continuation of the order for Rust to die is, in every sense, a denial of due process and equal protection, in total derogation of the constitutional prohibition against cruel and unusual punishment.

B. The imposition of the death penalty violates Petitioner's right to due process and equal protection under the Fourth and Fourteenth Amendments due to the failure of the Nebraska Supreme Court to apply L.B.711, Laws of 1978 in this instance.

"The Nebraska Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homocide committed on or after April 20, 1973." Neb. Rev.

Stat. §29-2521.02[2] (Emphasis added).

The incident giving rise to the charges against the Petitioner occurred on February 21, 1975, and sentencing took place on October 30, 1975. On appeal to the Nebraska Supreme Court from the denial of Post Conviction Relief, Petitioner, inter alia, assigned as error the District Court's failure to apply the provisions of L.B. 711. The court replied as follows:

> "No capital case in which a final sentence was imposed prior to the effective date of L.B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act." State v. Rust, Neb., 303 N.W. 2d 490, 493 (1981).

To the contrary, the Nebraska Supreme Court is to determine the propriety of the sentence in every case which involves a criminal homicide committed on or after April 20, 1973, to insure that each case produces a similar result when compared to other cases with the same or similar circumstances. Neb. Rev. Stat. §29-2521.01 - 29-2521.03 (Emphasis added).

In an earlier case, State v. Williams, Neb., 289 N.W. 2d 18 (1979), the Court held that "L.B. 711, ... will be construed to require the Supreme Court to review and analyze only those cases involving a conviction for first degree murder committed on or after April 20, 1973." (289 N.W. 2d at 29). It is patently clear that the judicial interpretation given the language "all criminal homocides" in the Williams case is in direct contradiction to the clear language of L.B. 711; and that in Petitioner's case, the court narrowed its application of the legislative mandate further. For John Rust, even under the limited construction in Williams, would not have been excluded from the benefits of L.B. 711. Petitioner is, however, included on the courts list for comparison purposes with other cases.

[2]It should be noted that April 20, 1973, was not arbitrarily chosen as the cut-off date for review. During legislative floor debate in response to a question posed regarding that particular date, the bill's sponsor answered that that particular date was selected because that was the date on which the death laws had been enacted.

Robert E. Williams and Harold L. Otey, both sentenced to death prior to July 22, 1978, were allowed the benefits of L.B. 711. See, State v. Williams, 205 Neb. 56, 287 N.W. 2d 18 (1979); State v. Otey, 205 Neb. 90, 287 N.W. 2d 36 (1979). This fact, alone, confirms that John Rust has been denied his right to due process and equal protection under the Fourth and Fourteenth Amendments.

Although the language utilized by the legislature is clearly unambiguous, a review of the legislative history indicates that L.B. 711 was understood by the members of the Nebraska Legislature to apply to all people on death row, including John Rust. For example, speaking in support of the bill, Senator Cullen said the following:

> "One of the things that bothers me about the current situation is that today in the State of Nebraska there are four people scheduled for execution while there are sixty three people in the penitentiary who are convicted of First Degree Murder and I think that we are arbitrary and that only the unlucky people are the ones who are going to be executed because those sixty-three people have all taken human lives and I think we need to be more fair and more consistent in our legal penalities and I think this bill is a step in the right direction."

One of those "four people" referred to by Sen. Cullen is John Rust. The express purpose of L.B. 711 is to provide guidelines for the State to apply and follow in the most "scrupulous" manner to insure fairness and uniformity. Neb. Rev. Stat. §29-2521.01(1). The Nebraska Supreme Court's ruling in Petitioner's case not only significantly departs from the clear and plain meaning of the words employed by the legislature but also from the clear and plain intent of the law - which is to insure uniformity.

In Scales v. United States, 267 U.S. 203 (1961), this Court held that it will "often strain to construe legislation so as to save it against constitutional attack, it will not carry this to the point of perverting the purpose of the statute." It is understandable and expected that this Court would be reluctant to construe legislation when the highest state court has not spoken. However,

derogation of the principle of fundamental fairness, thus denying Petitioner his constitutional right to due process and equal protection. In essence, the Nebraska Supreme Court has construed this legislation to the point of perverting the purpose of the statute.

## II. THE NEBRASKA DEATH PENALTY STATUTES VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AS THEY RESULT IN AN ARBITRARY, CAPRICIOUS, AND DISCRIMINATORY IMPOSITION OF THE DEATH SENTENCE.

### INTRODUCTION

In the wake of Furman, the Nebraska legislature enacted death penalty statutes, which attempted to set objective standards for the imposition of the death sentence. Although each State has the primary responsibility for operating the machinery of criminal justice within its borders, the United States Constitution mandates that the procedures utilized comport with the Due Process Clause and be fundamentally fair in every aspect. Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting). The question presented here is whether those statutes enacted by the Nebraska legislature are substantial enough to meet that constitutional mandate. Petitioner contends that the operative "machinery" devised by the Nebraska legislature are not.

This Court noted in Gregg, that "each distinct system must be examined on an individual basis," Id. at 195, to ascertain whether the sentencing decision patterns result in an arbitrary and capricious imposition of the death penalty. As will be demonstrated, the death sentence is still "wantonly and freakishly imposed" in Nebraska due to the vague and indefinite controls on the sentencing authority and the failure to provide for a meaningful comparative appellate review.

### A. The aggravating and mitigating circumstances set forth are vague, indefinite and overbroad in violation of the constitutional prohibition against cruel and unusual punishment.

Under Nebraska law, a person convicted of murder, may be sentenced to death if it is found that the offense "was especially

heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence." Neb. Rev. Stat. §29-2523 (1)(d), or if "[t]he offender ... has a substantial history of serious assaultive or terrorizing criminal history." Neb. Rev. Stat. §29-2523 (1)(a). It is readily apparent that the same problems which this Court identified in Godrey v. Georgia, 446 U.S. ____(1980), as unconstitutional exist under the Nebraska scheme. The statutes do not enunciate "clear and objective" standards which provide "specific and detailed guidance" allowing for the rational review of the death sentence process. The test for unconstitutional vagueness has long been recognized to be when "[m]en of common intelligence must not be forced to guess at the meaning." Connelly v. General Const. Co., 299 U.S. 385 (1926).

The provisions of §29-2523, must be considered as they have been construed and applied by the Supreme Court of Nebraska. Petitioner contends that there is no principal way to distinguish this case, from the many cases where the death penalty was not imposed. While the provisions may perhaps be facially acceptable, a brief comparison will demonstrate that the court continues to impose the death penalty in an arbitrary and capricious manner regardless of the criteria set forth by the legislature.

In State v. Nokes, 194 Neb. 844, 224 N.W. 2d 776 (1975) the facts disclose that at a meeting, pre-arranged by the defendant, he and his wife had shot and killed a couple, dismembered their bodies with a butcher knife, wrapped the pieces, placed them in a freezer, and later they were thrown into a lake. The defendant received a life sentence. Although the court did not find that Petitioner's offense "was especially heinous, atrocious ..." he was nevertheless given the death penalty, while in Nokes, an offense which manifests "exception depravity," the court was not so inclined.

In Arnold v. State, 224 S.E. 2d 386 (Ga.1976), the Georgia Supreme Court held the "substantial history of serious assaultive criminal convictions" was an unconstitutionally vague aggravating circumstance. The Nebraska statute allows that a person with "a substantial history of ... criminal activity" as sufficient for imposing the penalty of death. Neb.Rev.Stat. §29-2523(1)(a) (Emphasis added). Although the Nebraska Supreme Court has interpreted

that phrase to refer only to events and incidents prior to the current charge, State v. Holtan, 197 Neb. 554, 250 N.W. 2d 876 (1977), the cases are riddled with inconsistent and contrary applications. For example, Ell, Rust's co-defendant, was wanted in another state on a charge for criminal violence. Yet, the court found this aggravating circumstance not to apply as there was no conviction, State v. Ell, 196 Neb. 800, 246 N.W. 2d 594 (1976), even though the same sub-section of that statute provides separately for a previous "history" involving the threat of violence to another person.

If, as in Arnold, the term "convictions" is not sufficiently clear, then "activity" also falls short of articulating an "objective standard." The problem with uniform sentencing is best exemplified by the Chief Justice of the Nebraska Supreme Court, stating that,

> "(1) If the death penalty is not appropriate in this case, when will it be appropriate, ... with regard to the first question, let me simply say that I believe I will recognize an appropriate case when I see it." State v. Williams, 205 Neb. 56, 287 N.W. 2d 18, Kirvosha, C.J., dissenting (1979).

It is axiomatic that the death penalty can not be imposed under such a rationale. As the statutes do not articulate standards that allow for a rational review of the sentencing process, under Godfrey, supra, the Nebraska statute must be found unconstitutional.

B. The Nebraska capital sentencing procedure limits the mitigating circumstances which may be considered by the sentencing body in violation of the Eighth and Fourteenth Amendments.

In Lockett v. Ohio, 438 U.S. 586 (1978) and Bell v. Ohio, 438 U.S. 637 (1978), this Court came to the conclusion that the sentencing authority must "not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett, supra at 604 (Emphasis added). This conclusion was inevitable by "society's rejections of the belief that every offense in a like legal category calls for an identical punishment without

regard to the past life and habits of a particular offender." Robert V. Louisiana, 428 U.S. 325, 333 (1978) (plurality opinion).

The Nebraska Supreme Court has noted that although the trial court may determine that a fact is not a mitigating circumstance within the specific provisions of the statutes, trial courts may still permit the evidence to be received, e.g,, Holtan, 287 N.W. 2d at 674 (1980). The fallacy of this approach is evident by observing the result of such logic. When a fact is received in evidence as a mitigating factor, but not as a mitigating circumstance, its weight in the balance of aggravating and mitigating circumstances is less than should be intended. Section 29-2519 of the Nebraska statutes states the intent of the legislation in certain terms, in that the failure "to allow for mitigating factors which may dictate against the penalty of death ... requires the establishment of specific legislative guidelines to be applied ...", which have subsequently taken the form of mitigating and aggravating circumstances. The Nebraska Supreme Court has stated that nothing in the statute precludes the court from considering all aspects of the defendant's character. Holtan, supra, at 674. Yet, in the same breath, found the trial court correct in concluding that a certain matter did not specifically fall within one of the mitigating circumstances. Id. The statute has been construed to enumerate exclusive mitigating factors, which tend to bar the consideration of any other possibly relevant factors in the weighing process. Compliance with the Eighth Amendment requires that a capital sentencing system permit any evidence proffered by the defendant, in mitigation, even though not defined by statute, be weighed against those aggravating circumstances which are statutorily defined. The opinions of this Court have consistently noted the importance of individualized sentencing in capital cases as a constitutionally indispensable part of the sentencing process. See, Woodson, 428 U.S. at 304 (1976). The Nebraska Supreme Court's choice of what information is to be included in the individualized sentencing process is not in accord with the mandate of Lockett. In Proffitt, this Court approved the Florida statute under the assumption that the mitigating factors listed were

not exclusive. In Nebraska, such an assumption would be totally false. Thus, as applied, the Nebraska statutes are unconstitutional because the court fails to treat persons convicted of a designated crime as "uniquely individual human beings".

C. The statutory procedures governing the imposition of the death sentence are vague, overbroad, confusing and not guided by any ascertainable rules or standards to assure fairness, uniformity, and a meaningful review in violation of the Eighth and Fourteenth Amendments and Article I, Section Nine of the Constitution of the State of Nebraska.

Furman mandates that "where discretion is afforded a sentencing body on a matter so grave [as the taking of a human life] the discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action". Gregg, 428 U.S. at 189 (1976). One of the fundamental concerns of this Court in reviewing the death penalty has been to ascertain whether the procedure utilized by the states creates a degree of fairness and predictability. The Petitioner contends that the Nebraska Statutes do not.

First, Section 29-2520 gives the trial judge several options as to the composition of the sentencing authority. He may impose the sentence himself, or with two additional appointed judges, or remove himself completely where upon three different judges will determine the sentence. However, the statute provides no standards to control the judge's decision on which of the three alternatives should be utilized. The decision is solely within the uncontrolled discretion of the trial judge, which invariably leads to the arbitrary and discriminatory application of this statute. Presumably, a trial judge's personal opinion on the death penalty may affect his decision on whether to ask for the aid of two other judges. This factor and numerous others which could also affect his decision are unreviewable. There is no way to determine why some of the Nebraska death row inhabitants such as Holtan, Anderson, and Petitioner were sentenced by a panel of three judges, while others such as Stewart and Simants were sentenced by the trial judge. Whether the difference can be found in the type of crime, the race of the defendant or even the religious beliefs of the trial court is not ascertainable because there are no standards.

Second, the procedure is constitutionally defective because it is devoid of legislative guidance in situations where the three judge panel is invoked. The problem is that there is no guidance concerning what vote is necessary to impose a sentence of death. Whether a majority vote or a unanimous vote is required is also not ascertainable. Other situations might occur where the sentencing judge, if unsatisfied with the opinions of the two appointed judges, could disband the panel and impose sentence himself. Assuming that a majority vote is necessary, the statute is silent on this point, there is a serious potential for unfairness because similarly situated defendants will be treated differently in violation of the Equal Protection clause of the Fourteenth Amendment.

Third, the statute does not provide for review of that decision in this Court. In Woodson, this Court noted that, as one of Furman's basic requirements, all actual discretionary decisions must be subject to judicial review. Id. at 303. The failure to make such a provision in the statute renders it invalid. Woodson v. North Carolina, 428 U.S. 280 (1976).

Clearly, the infirmities of this procedure pose serious constitutional questions. The guidance invisioned by the Proffitt and Gregg Courts to insure that the death sentences are uniformly imposed in cases of similar circumstance has not been fulfilled. Therefore, this Court should grant the writ to review this most serious violation.

## III. THE NEBRASKA DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THEY FAIL TO PROVIDE A MEANINGFUL COMPARATIVE APPELLATE REVIEW FOR THE SELECTIVE IMPOSITION OF THE DEATH PENALTY.

### A. Comparative appellate review of the imposition of the death penalty is required by the Eighth and Fourteenth Amendments.

The post-Furman legislation enacted in Nebraska did not provide for comparative appellate review. In 1977, however, the legislature did pass a bill amending the death penalty statutes,

requiring such analysis. L.B.711, Laws of 1978, has now been codified as part of Chapter 29, Sections 2521.01 to 2521.04 and 29-2522. Patterned after the Georgia Act, the newly enacted §29-2521.03 requires the supreme court to "determine the propriety of the sentence in each case involving a criminal homocide by comparing such case with previous cases involving the same or similar circumstances." (Emphasis added).

This Court noted that the concerns expressed in Furman could be met by carefully drafted statutes which ensure that the sentencing authority have adequate information and guidance. Gregg, supra at 195. Yet, the formulation of criteria alone does not ensure that the death penalty will cease to be imposed in an arbitrary and capricious manner. The objectivity and even-handedness this Court hopes for is painfully absent from the review scheme administered in Nebraska.

B. The Nebraska statutes, as interpreted by the Supreme Court of Nebraska, fail to provide for a meaningful comparison of the sentence imposed on all persons convicted of a homicide resulting in the discriminatory imposition of the death penalty.

The Nebraska legislature has determined that "[t]he death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria." Neb. Rev. Stat. §29-2521.01 (2). To ensure that "[n]o sentence imposed shall be imposed greater than those imposed in other cases with the same or similar circumstances," Neb. Rev. Stat. §29-2521.03, the Nebraska Supreme Court is statutorily directed to review and analyze all criminal homocides committed on or after April 20, 1973, by examining: (1) the facts including mitigating and aggravating circumstances; (2) the charge filed; (3) the crime for which the defendant was convicted; and (4) the sentence imposed. Neb. Rev. Stat. §29-2521.02.

The Nebraska Supreme Court's response to the legislative "guidance" was, "[t]o interpret the language of L.B. 711 literally would create insurmountable constitutional problems." State v. Williams, 205 Neb. 56, 287 N.W. 2d 18 (1979). Thus, the court has

interpreted the language to require a review and analysis of only those cases which involve a conviction for first degree murder where the death penalty has been imposed. Id. Unlike Gregg, where this Court determined that Georgia had taken its review responsibilities seriously, 428 U.S. at 205, Petitioner contends that the Nebraska court has not, not even in spirit. This Court, in Proffitt, determining that the Florida court also took a serious view of its review responsibility, denied any suggestion that the Court engaged in a "rubber stamp" review because it has vacated over one-third of the death sentences considered. 428 U.S. at 258-59. Of the thirteen persons sentenced to die since 1973, the Nebraska court has vacated only two. In one case it was held that age was a mitigating factor; the other case required a second trial because a bailiff had visited the sequestered jury during the first trial, where the defendant was acquitted by reason of insanity and confined to the Regional Center. See, State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849 (1977); State v. Simants, 197 Neb. 549, 250 N.W. 2d 881 (1977). Neither of these cases involved a reduction in sentence because the court found that the sentence was greater than those imposed in other cases with the same or similar circumstances.

Where the court has made a comparative analysis, the failure to provide reasoned opinions in support of its sentence review decision makes it impossible to determine whether this procedure is fulfilling its ostensible purpose. In the death cases which have been reviewed under the new statute, the court has merely asserted that a particular death sentence did (or did not) pass muster under the statutory standards.

The Nebraska Supreme Court has made only conclusive statements that the death sentence was appropriate under the new statutes,

> "We have made the review and analysis of similar cases required by section 29-2521.02 et. seq., ..., We find the sentence of death imposed in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." State v. Otey, 205 Neb. 90, 287

N.W. 2d 36, 41 (1979); See also, State v. Williams, 205 Neb. 56, 287 N.W. 2d 18, 29-30 (1979); State v. Harper, ___ Neb. ___, 304 N.W. 2d 671, 673 (1981).

In only one case, State v. Williams, (1979), did the court provide a list of cases it had "considered", but it did not articulate any principles which would rationalize the cases, or demonstrate how the facts of the case under review merited a harsher sentence than had been imposed in other cases where apparently more aggravated crimes had received lighter sentences.[3]

Whether or not the Nebraska Supreme Court has, in fact, accumulated records in any or all capital cases pursuant to Section 29-2521.02 and, if so, what facts and conclusions they contain are unknown. In the capital cases that have been reviewed under the statute, the Nebraska Supreme Court has said nothing of any of this, contenting itself with merely a cursory statement of their conclusion upon review. A thorough analysis of the information held by the court shows that the information collected is incomplete, inaccurate, unindexed, and in a general state of disorder. The L.B.711 Inventory of Materials held by the supreme court as of June 9, 1981, demonstrates that the list is comprised of only first degree murder cases, contrary to the legislative mandate. Upon examination of that Inventory, it was evident that the records contained nothing more than a compilation of trial transcripts and pre-sentence hearings. Whether a legal assistant has made any synopsis, briefs or extracts of the information on hand is, again, unknown. The records necessary to satisfy the legislative mandate simply do not exist.

A second problem evident is that the legislature has not defined "circumstance". The comparison required by the statutes is to occur between the case under review and those of "same or similar circumstance". The comparison required by the statutes is to occur between the case under review and those of "same or similar circumstance". The query is, even if "adequate information" was

[3] In State v. Simpson, 200 Neb. 823, 265 N.W. 2d 681 (1978), the court merely asserted that the circumstances of the crime fully justified the sentences imposed (prosecution for robbery and felony-murder where the facts disclosed that two hitchhikers first shot, then dragged the driver out of the truck and fired several more shots into the body before they robbed him).

available, which circumstances are to be compared. The majority of the Nebraska Supreme Court has taken the position that "circumstances" refers to those aggravating and mitigating factors which have been found to exist in death penalty cases previously affirmed, Williams, supra, at 29. But, as pointed out by Chief Justice Krivosha, factors such as age or prior record of the defendant are not nearly as significant as the circumstances under which the murder was committed, which would necessarily include those cases where the death penalty was not imposed. (Id. at 32-33, dissenting opinion). It is obvious that each approach would result in a different conclusion. The statute, however, mandates review of "all homocides", which requires a comparison of those cases regardless of whether the defendant went to trial, whether the prosecutor reduced the charge, whether a single judge or a panel of judges imposed sentence.

Most imperatively, where human life is at issue, a State's procedures for determining when it shall be taken away are required by the Constitution to exhibit some rational relationship to their professed objectives. If the objective of Nebraska's appellate review procedure in capital cases is what the State professes -- to assure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances, then the form of those review procedures is irrational in light of that objective. The only other objective in view -- one to which, admittedly, the new review procedures are rationally related -- is to create the appearance of compliance without its reality and thereby evade Furman's command. This Court advised that merely constructing a sentencing scheme along the general lines as described in Gregg would not inevitably satisfy the concerns of Furman, "for each system must be examined on an individual basis." 428 U.S. at 195. It is for that reason that this Court should grant certiorari to review the Nebraska legislation and their application.

C. The Nebraska procedure for comparative appellate review denies a criminal defendant effective assistance of counsel as the scheme does not provide reasonable notice of the grounds alleged by the prosecution and information considered by the sentencing authority in violation of the Sixth and Fourteenth Amendments.

As it is the duty of the supreme court to apply the comparative analysis as mandated by statute, it is imperative that counsel have the requisite information necessary to adequately prepare for the sentencing phase of trial. In Georgia, the legislature has enacted a statute which provides that "only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible" at the pre-sentence hearing. Ga. Code Ann. §27-2503 (Supp. 1975). Nebraska has no like provision. Without legislative or judicial guidelines, an attorney is left to guess at the actual application of the law to his client. To be certain, there could be no compelling state interest which outweighs a defendant's right to the due process of advance notice.

In Petitioner's case, for example, the state presented evidence on two aggravating circumstances. The court, however, in its opinion, found that four aggravating circumstances had been proven. This Court has repeatedly held that the sentencing authority "must not be precluded from considering as a mitigating factor ... any that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 586. Without adequate notice of all the evidence which either the prosecution or the court will consider in determining the sentence, an attorney is unable to present the courtervailing or mitigating factors, which, in effect, tend to negate those aggravating circumstances.

Further, without access to the materials which have been complied by the court, purportedly for comparison purposes, counsel is unable to differentiate and distinguish his client's case. At the most critical phase of trial, a defendant is denied effective assistance of counsel in violation of his Sixth Amendment right.

IV. THE NEBRASKA DEATH PENALTY CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION NINE TO THE CONSTITUTION OF THE STATE OF NEBRASKA.

A. By electing to repeal the death penalty, the people of the State of Nebraska demonstrated their repugnance toward its imposition.

The Clause, forbidding "cruel and unusual" punishment, acquires meaning as public opinion becomes enlightened by a human justice. Weems v. United States, 217 U.S. 349, 378 (1910). Thus, a valid assessment of contemporary values concerning the death penalty requires that this Court look to objective indicia that reflect the public attitude toward its imposition. Gregg, 428 U.S. at 173 (1976).

In January, 1979, a bill calling for the repeal of capital punishment was introduced in the Nebraska legislature. The bill was passed by the Unicameral, which elected to reduce the penalty for first degree murder from death to life imprisonment. Governor Thone, however, vetoed the bill. Admitting the difficulty of his decision, he stated that,

> "In the final analysis, the death penalty can only be justified if it served as a deterrent to murder and thereby saves the lives of some innocent persons who would otherwise become murder victimes. While the evidence is not completely clear, it appears that the death penalty serves as a deterrent in some cases."[4]

This Court has stated that the judgment of a legislature weighs heavily in ascertaining public attitudes, for in this society it is the legislature that is constituted to respond to the will of the people. Gregg, supra, at 175. Accordingly, a heavy burden rests on those who attack the judgment of the representatives of the people. Id. The rationale utilized by the Governor is, at best, weak, if not wholly unsupported by evidence he views as merely "unclear". In fact, both Justice Brennan and Marshall noted in

[4] "Legislation and Corrections" Corrections Compendium, CONtact, Inc., November and December, 1979.

Furman, that available statistics deny the use of capital punishment as a deterrent. 408 U.S. at 301-04, 345-56. Specifically, those statistics demonstrate that use of the death penalty has been shown to be unnecessary for society's protection in that those jurisdictions which have abolished capital punishment have lower murder rates.

It is clear that the people of the State of Nebraska acquiesced in the passage of the death penalty's abolition, but it is not so clear that the public acquiesced in the governor's exercise of the pocket veto. It is very likely that the punishment is tolerated only because of its disuse. The death sentence has not been carried through in Nebraska since 1959. The task before this Court is to review the history of and examine the present practices of the use of the death penalty. In Furman, this Court stated that "Legislative authorization ... does not establish acceptance." 408 U.S. at 279. Execution of Petitioner would offend the public conscience to such an extent that to allow his sentence to be carried through violates the principles inherent in the Eighth Amendment.

B. Death by electrocution is unacceptably cruel under the contemporary standards of decency thus violative of the Eighth and Fourteenth Amendments.

The penalty of death has been utilized by the States throughout history. Although the exact scope of the constitutional phrase "cruel and unusual" has bot been defined, Trop v. Dulles, 356 U.S. 86, 99 (1958), this Court in Furman took note that the history of this punishment is one of "successive restriction" 408 U.S. at 299. Indeed, the Cruel and Unusual Punishments Clause is not conducive to precise definition, yet it is incumbent upon this Court to determine the constitutional validity of a challenged punishment. Id. at 258.

The Kemmler decision, where the Court approved of electrocution as a humane method of execution, was handed down nearly one hundred years ago. The evolving standards of decency, however, mandate that death by electrocution does not comport with human dignity. The attendant humiliations of shaving the prisoner's

body hair, stripping, and producing incontinence are degrading to the dignity of human beings which is the principle protected by the Eighth Amendment.

Today, there are several less restrictive methods available. Lethal injections or medication are civilized alternatives to execution. In 1977, Oklahoma became the first state to sanction their use, followed by Texas, Idaho, and New Mexico. Instead of the "last mile" walk from Death Row to the electric chair, the condemned prisoner would be taken to a room similar to those in a hospital, then administered an anesthetic. This method simply induces sleep, followed by death, without the humiliations that accompany death by electrocution. See, Sentenced to Die, S.H. Gettinger, 1979, pgs. 85-86.

The Eighth Amendment is to be interpreted in a flexible and dynamic manner, as the framers were not exclusively concerned with prohibiting only torturous punishments. In light of contemporary human knowledge, this Court must reconsider the constitutional validity of imposing death by electrocution.

V. PETITIONER WAS RENDERED PREJUDICIALLY INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

"In an adversary system of criminal justice, there is no right more essential than the right to assistance of counsel." Lakeside v. Oregon, 435 U.S. 333, 341 (1978). It has been recognized, even prior to Gideon, that the right to counsel is the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 781, n.14 (1970) (Emphasis added). If the right to counsel means anything less than that, the constitutional safeguard to a fair trial is substantially impaired.

In Nebraska, it is well established that the standard for determining whether counsel for the defendant in a criminal prosecution has provided adequate represertation is whether counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law in his area and whether he conscientiously

protected the interests of his client, State v. Auger, 200 Neb. 53, 262 N.W. 2d 187 (1978); State v. Bartlett, 199 Neb. 471, 259 N.W. 2d 917 (1977). Further, defendant must show that he was prejudiced by either the actions or inactions of defense counsel. State v. Lang, 202 Neb. 9, 272 N.W. 2d 775 (1978). This is not a case where hindsight has been utilized as a criteria in judging the ineffectiveness of counsel, but rather, where both court and counsel were made aware of the unsatisfactory situation on numerous occasions throughout the entire proceeding. For example, directly after a Pre-trial motion hearing, wherein Petitioner's counsel had not even filed any motions, Petitioner requested new counsel because he was urging him to plead guilty lest the judge become irritated for wasting the taxpayers' money and impose a greater sentence.

On appeal to the Supreme Court of Nebraska, Petitioner alleged over twenty-five specific instances which establish the prejudicial ineffectiveness of counsel; each fully substantiated by testimony adduced at Petitioner's Post-Conviction Hearing. It is conceded and has been noted, after extensive research, that few cases were reversed on this particular ground. However, the overwhelming majority of those cases stated only several, if not one, acts or omissions of counsel. Petitioner, in this case has been egregiously prejudiced due to the multitude of errors committed by counsel, which distinguish this case from others that have been before this Court.

Although adequacy of counsel cannot be determined solely on the basis of his time spent interviewing a client, Holtan, 287 N.W. 2d at 675 (1980), it is certainly an indication of the effort put forth toward assuring a meaningful defense. It is a matter of public record that Petitioner's counsel conferred with his client for only a total of 5.5 hours on ten separate occasions. It would be more than stretching the truth to concede that such a showing by counsel is sufficient to constitute a faithful representation in the best interests of the Petitioner.

In Lang, the Supreme Court of Nebraska adapted the holding in McQueen v. Swenson, 498 F. 2d 207 (8th Cir., 1974) where the court states that "[t]he exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case... ." Not only did counsel fail to take Petitioner to the scene, as was ordered by the court, but also failed to review the police reports. Had counsel done either of these, he would have had the information and evidence necessary to develop and assert the crucial defense that; 1) his client could not possibly have shot Michael Kellogg and; 2) that there was no evidence of malice aforethought or premeditation involved, as noted by the trial court judge, thus establishing a basis for a conviction on a lesser degree of homicide. Without a doubt, counsel's failure to take such action was the source of excessive prejudice to Petitioner.

In United States v. Wade, 388 U.S. 218(1967), this Court recognized that the Sixth Amendment guarantee applies to "critical" stages of the proceedings, and in interpreting this constitutional protection, went on to say that "[t]he plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defense". Id. at 224-25. Counsel, in this case, neglected to attend the hearing regarding the newly established ground rules for sentencing announced by the Nebraska Supreme Court. Failing to inform either the court or his client that he would not make an appearance, he made no effort to ascertain what had occurred during that hearing. Without that information in hand, Petitioner's contention that counsel failed to discuss sentencing strategy with him has definite merit.

As a practical matter, counsel was aware that Petitioner had been previously labeled as violent and as a sociopath. It is apparent from the record that counsel did not pursue or investigate the possibility of an insanity defense. Incredibly enough, counsel testified at the post conviction hearing that he could not think of a defense to present at trial. While the value of coun-

sel to the accused in a criminal prosecution does not lie in his ability to recite a list of possible defenses in the abstract..., it frequently involves practical considerations as well as specialized knowledge of the law. Tollet Henderson, 411 U.S. 258, 267-68 (1973). The failure to investigate this concrete defense is, under these circumstances, a denial of effective assistance of counsel.

Counsel, in regard to his failure to make an opening statement, cross-examine witnesses and make certain evidentiary objections, stated that his actions were the result of tactical decisions. The Nebraska Supreme Court, in granting the privilege of discretion, greatly over-extended the limits of what should be acceptable "due deference." In this particular instance, the extension of this courtesy permitted counsel to cover-up his own inadequacies and lack of expertise in handling Petitioner's case.

If the right to counsel is to serve any purpose, defendants cannot be left to the mercies of incompetent counsel. McMann, supra at 771. Petitioner, denied his constitutional right to effective counsel coupled with the inevitable bias which resulted, has been deprived his fundamental right to a fair trial.

VI. THE NEBRASKA DEATH PENALTY STATUTES VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IN THAT THEY DENY A DEFENDANT CONVICTED OF A CAPITAL CRIME THE RIGHT TO A JUDGMENT OF HIS PEERS AS TO THE EXISTENCE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES AND THE APPROPRIATENESS OF THE PENALTY OF DEATH.

Upon examination of the mitigating and aggravating circumstances delineated in §29-2523 of the Nebraska Statutes, it is apparent that the existence or non-existence of those circumstances necessarily involves a determination of facts.

Traditionally, the process of ascertaining the true facts from evidence presented at trial has been made made by juries. This Court has intimated that jury sentencing in capital cases is not only desirable, but also provides the increasingly important link between contemporary community values and the penal system -- a

link without which, the determination of punishment could hardly reflect evolving standards of decency. Witherspoon v. Illinois, 391 U.S. 510, 519, n.15 (1968). While it is not suggested that jury sentencing is constitutionally required, neither was the right to assistance of counsel until 1963, nor had the right to a speedy trial been considered by this Court until 1967, to cite only a few examples of rights which also had not been constitutionally mandated until this Court held them to be such.

In Nebraska, the statutory scheme specifically excludes the jury from participating in the sentencing phase of a defendant convicted of a capital crime. The bifurcated systems now utilized by a majority of the States ensure that problems involving the presentation of evidence relevant to both guilt and the determination of sentence have been eliminated. If left unguided, the fact that juries would impose the death penalty in a "freakish"manner is not disputed, but as this Court pointed out in Gregg, standards to guide a capital jury's sentencing deliberations have been developed. 428 U.S. at 193. Any speculation that judicial sentencing will lead to a greater consistency in the imposition of the death penalty is unfounded. In Lockett, this Court reaffirmed the belief that States are entitled to assume that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision." 438 U.S. at 598. Based upon that assumption and the reality that some States do provide for jury determination of the facts relating to sentencing, it is now incumbent upon this Court to decide this serious constitutional question.

VII. BY OVER-RULING DEFENSE COUNSEL'S OBJECTION TO PROSECUTOR'S COMMENTS REGARDING PETITIONER'S CHOICE NOT TO TESTIFY, THE TRIAL COURT COMMITTED CONSTITUTIONALLY REVERSIBLE ERROR.

In Griffin v. California, 380 U.S. 609 (1965), this Court held that the "Fifth Amendment forbids comment by the prosecution on the accused's silence. ..." Id. at 615. More recently, this

Court has reasoned that only adverse comment on a defendant's failure to testify is barred by the Fifth and Fourteenth Amendments. Lakeside, 435 U.S. at 339 (1978). In the case at bar, the prosecutor, during closing argument, made recurring references to Petitioner's failure to testify, using Rust's silence as evidence against him. The impact of the prosecutor's remarks impermissibly focused the jury's attention upon his silence. His comments were not isolated references, but rather formed the entire theme of the State's summation. The right afforded a defendant against self-incrimination is of constitutional magnitude and, as such, must be jealously preserved.

The Griffin case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his constitutional privilege not to testify. Carter v. Kennedy, 29 LW 4225, 4229. It is clear that infractions of some constitutional rights can never be treated as harmless error, and this is such an instance. The question to be considered is not whether sufficient evidence was presented on which Petitioner could have been convicted without the comments of the prosecutor complained of, but rather, whether there is a reasonable possibility that his comments contributed to Petitioner's conviction. See, Fahy v. Connecticut, 375 U.S. 85, 86 (1963). If the Griffin case is to maintain any credibility, the proper test must be, as the lower federal courts have widely held,

> "Whether the language used by the prosecutor was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on a failure of the accused to testify." United States v. Walton, 552 F. 2d 1354, 1362 (10th Cir. 1977). See also, State v. Nelson, 234 N.W. 2d 368, 370 (Ia. 1975).

If the privilege against self-incrimination continues to be interpreted and applied narrowly, then its purpose is ignored and defendants will continue to pay the court-imposed costs for exercising their constitutional rights.

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## CONCLUSION

For all of these reasons, Petitioner respectfully urges this Court to grant his Petition for a Writ of Certiorari to the Supreme Court of Nebraska.

Respectfully submitted,

GERALD E. MORAN
of WATTS & MORAN
2411 "M" Street
Omaha, NE 68107
402-733-7766
Attorneys for Petitioner

APPENDIX A

STATE V. RUST

No. 43019 - filed March 20, 1981.

1. Post Conviction: Motion to Vacate. A motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated.

2. Criminal Law: Statutes. The amendment of a statute under which an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence.

3. Criminal Law: Effectiveness of Counsel. Our standard for determining whether or not counsel for a criminal defendant has provided adequate representation is that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.

4. Post Conviction: Proof: Appeal and Error. The defendant has the burden of establishing a basis for relief in a post conviction proceeding and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous.

5. Criminal Law: Effectiveness of Counsel. The determination of sufficiency of counsel must be made within the context of the facts of a particular case, and we will not require defense counsel to develop ridiculous trial tactics because they are suggested by the defendant.

6. Criminal Law: Aggravating and Mitigating Circumstances. In order for something to be considered a mitigating factor it must be probative of any aspect of the defendant's

character or record or any of the circumstances of the offense that could be proffered as a basis for a sentence less than death.

7. Criminal Law: Appeal and Error. It is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh evidence. Such matters are for the trier of fact, and the verdict must be sustained, if taking the view most favorable to the state, there is sufficient evidence to support it.

Heard before Krivosha, C.J., Boslaugh, McCown, Clinton, Brodkey, White, and Hastings, JJ.

WHITE, J.

This case is now before this court appealing the denial of a motion for post conviction relief. On February 2, 1977, this court affirmed the jury verdict convicting the defendant, John E. Rust, of felony murder and the decision of a three-judge panel sentencing him to death for that murder. State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977). Defendant cited as the basis for vacating and setting aside his conviction and sentence that he had had prejudicially ineffective assistance of trial counsel; that he was entitled to the benefits of Neb. Rev. Stat. § 29-2522 (Reissue 1979), as amended by 1978 Neb. Laws, L.B. 711, adopted subsequent to his sentencing; that the provisions of Nebraska's death penalty law violate the eighth and fourteenth amendments of the United States Constitution. The District Court denied defendant's motion and defendant appeals. We affirm the decision of the District Court.

Defendant assigns as error the following: (1) The finding of the trial court that the Nebraska death penalty law does not violate the eighth and fourteenth amendments prohibition against cruel and unusual punishment; (2) The finding that defendant was not denied effective assistance of trial counsel; (3) The District Court's failure to

apply the provisions of L.B. 711; and (4) The District Court's failure to hold that Nebraska's death penalty is unconstitutional as applied to defendant.

"[A] motion to vacate a judgment and sentence under the Post Conviction Act cannot be used as a substitute for an appeal or to secure a further review of issues already litigated." State v. Holtan, 205 Neb. 314, 317, 287 N.W.2d 671, 674 (1980). In his direct appeal to this court, defendant raised the constitutional issues he now combines into assignment of error (4) and they will not be reconsidered.

Defendant argues under assignment of error (1) that his sentence is cruel and unusual punishment in light of the confession of a codefendant, Ronald Ell, that Ell, not Rust, actually shot and killed the victim. This is apparently based on our discussion in State v. Rust, supra at 540-41, 250 N.W.2d at 875, regarding the propriety of sentencing one codefendant to life imprisonment and the other to death. In his direct appeal, defendant argued that his death sentence was arbitrary and discriminatory because Ell received a life sentence. We held that as a participant in the felony, Ell "was guilty of the murder of Kellogg only as an aider and abettor. He did not actually kill anyone. Although he was equally guilty with Rust in the robbery, his participation in the actual killing was relatively minor. See mitigating factor (e), § 29-2523, R.R.S. 1943." State v. Rust, supra at 541, 250 N.W.2d at 875.

Subsequent to Ell's sentencing, Ell appeared at defendant's post conviction relief hearing and testified that he had

shot the victim. When defendant and Ell were arrested, the gun that was used to shoot the victim was found lying near the defendant. At defendant's post conviction relief hearing, Ell testified that during the shoot-out between the police and defendant and himself, Ell shot and killed the victim, then gave defendant his gun and took defendant's gun because defendant's gun had jammed. At no time during defendant's trial nor during Ell's trial did either defendant suggest this version of the crime to their attorneys or to the court. Ell's testimony was uncorroborated and the District Court judge at defendant's post conviction relief hearing found it unbelievable. A prison guard at the penal complex testified at the hearing that defendant admitted shooting the victim and the police officer again identified the defendant as the person who shot the victim. The record supports that finding. Defendant's contention in this regard is without merit.

Defendant's third assignment of error is likewise without merit. "L.B. 711, Laws 1978, was not enacted until after the sentence in this case had been imposed and became final. Having become a final judgment prior to the effective date of L.B. 711, it is not affected by the adoption of L.B. 711. No capital case in which a final sentence was imposed prior to the effective date of L.B. 711, Laws 1978, is subject to the provisions of the act and will not be reviewed in light of the act." State v. Holtan, supra at 316, 287 N.W.2d at 673. The amendment of a statute under which

an accused was convicted does not affect the legitimacy of his conviction or the propriety of his sentence. United States v. Rojas-Colombo, 462 F.2d 1091 (5th Cir. 1972), cert. denied, 410 U.S. 990, 93 S. Ct. 1507, 36 L. Ed. 2d 188.

In his second assignment of error, defendant argues his trial counsel was prejudicially ineffective. Specifically, defendant alleges that his trial attorney failed to make an opening statement; failed to impeach witnesses on inconsistencies; failed to take defendant to the scene of the shooting; failed to depose witnesses after the court ruled, permitting depositions to be taken; untimely filed his pretrial motions; failed to discuss trial strategy with defendant; failed to argue that the felony robbery had terminated before the shooting; failed to notify the court that defendant was dissatisfied with trial counsel; failed to move for a mistrial on voir dire of jurors; failure to review police reports; failed to prepare for trial; failure to renew motion to sever after opening statements; failed to move for a mistrial after evidence of defendant's use of an alias was introduced, after evidence that weapon used in the robbery was stolen was introduced; failed to determine whether an insanity defense existed; failed to poll the jury; failure to prepare his own motion for new trial; failed to attend the hearing regarding sentencing ground rules; failed to discuss sentencing strategy with defendant; failed to introduce mitigating factors at the sentencing hearing other than those enumerated in the statutes; failed to review presentence investigation report; failed to inform sentencing court that

State had discussed possibility of a plea bargain; failed to call to the court's attention that the prosecution had proven only two aggravating circumstances when, in its sentencing order, the court found there were four aggravating circumstances; failure to offer evidence in the form of a letter from a South Dakota state's attorney concerning codefendant Ell's violent tendencies; failed to point out to sentencing court that its fact interpretation of the shooting incident was incorrect; and failed to prepare and argue effectively at the sentencing hearing.

Our standard for determining whether or not counsel for a defendant in a criminal prosecution has provided adequate representation is "'that trial counsel perform at least as well as a lawyer with ordinary training and skill in the criminal law in his area, and that he conscientiously protect the interests of his client.'" State v. Fowler, 201 Neb. 647, 655, 271 N.W.2d 341, 347 (1978).

The burden of proof is on the defendant and he must establish by a preponderance of the evidence the incompetency of counsel. State v. Auger & Uitts, 200 Neb. 53, 262 N.W.2d 187 (1978). In his order denying defendant post conviction relief, the District Court judge found generally that defendant had not met his burden of proof and did not establish that he had been prejudiced by the action or inaction of his counsel.

Specifically, the District Court ruled that defendant's contentions concerning his counsel's failure to argue that the felony had ended, to make evidentiary objections, to properly cross-examine witnesses, and to present evidence that codefendant Ell, not defendant Rust, had killed the victim were

without merit. The District Court likewise found that defendant, at the post conviction hearing, did not show the existence of mitigating factors in addition to those counsel raised at the sentencing hearing and that contention, therefore, was without merit. "The defendant has the burden of establishing a basis for relief in a post conviction proceeding, and the findings of the District Court in denying such relief will not be disturbed on appeal unless they are clearly erroneous." State v. Bishop, Davis, and Yates, 207 Neb. 10, 19, 295 N.W.2d 698, 704 (1980). The record in this case supports the findings of the trial court.

The determination of sufficiency of counsel must, of course, be made within the context of the facts of a particular case. In this case defendant's trial counsel had the following to deal with: (1) The testimony of an eyewitness that defendant shot Kellogg; (2) The testimony of a police officer involved in the shoot-out that he had followed defendant from the time he left the parking lot of the store through the time the defendant was apprehended; and (3) The testimony of an officer who stated he was shot by the defendant and the fact that the gun that wounded that officer and killed Kellogg was found near defendant after he was shot and apprehended. Defendant's counsel testified that when he confronted defendant with these facts, defendant offered no practical suggestions concerning how they should proceed with his defense. Defendant's only contribution

to his own defense was that his attorney offer to the court the story that defendant was shot at as he was walking past the area of the shoot-out and returned the fire.

Trial counsel for defendant testified at defendant's post conviction hearing. Concerning his failure to make certain evidentiary objections, cross-examine witnesses, and make an opening statement, he stated that his actions were the result of tactical decisions. "'[W]e grant due deference to the discretion of defense counsel to formulate trial tactics.'" State v. Fowler, supra at 656, 271 N.W.2d at 347.

We will not require defense counsel to develop ridiculous trial tactics such as defendant's counsel would have been required to do had he chosen to present defendant's tale that defendant was shot when he inadvertently passed by the shoot-out. Furthermore, the record supports the District Court's finding that defendant demonstrated no prejudice due to any of his counsel's tactics.

The mitigating factor defendant brought to the court's attention was a letter sent by a South Dakota state's attorney to the chief of detectives of the Omaha Police Department. The letter expressed the attorney's opinion that Ell was a highly criminal and dangerous person. At the post conviction trial, the District Court judge stated that the evidence was not relevant and could not be considered a mitigating factor. We agree. Because the facts establish that Rust murdered the victim, the criminal nature of his codefendant is not probative of "any aspect of a defendant's character or

record [or] any of the circumstances of the offense that [could be proffered] as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

Finally, the District Court's determination that Ell's testimony was unbelievable is supported by the evidence and, as a result, defendant's related arguments concerning ineffective assistance of trial counsel are immaterial. "It is the general rule that it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh evidence. Such matters are for the trier of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it." State v. Fowler, 201 Neb. 647, 658, 271 N.W.2d 341, 348 (1978).

For the reasons set out above, we find that the decision of the trial court denying defendant post conviction relief is supported by the evidence and is affirmed.

AFFIRMED.

KRIVOSHA, C.J., concurring in part, and in part dissenting.

I concur in the majority's opinion in this case in all respects save with regard to the majority's conclusion that the imposition of the death penalty in this case is constitutionally permissible. In that regard, I dissent.

Even if I disregard the provisions of 1978 Neb. Laws, L.B. 711, now Neb. Rev. Stat. §§ 29-2521.01 et seq. (Reissue 1979), adopted subsequent to the sentencing in this case, I must of necessity still conclude that the imposition of the death penalty in this case is in violation of the appellant's constitutional rights which existed prior to the adoption of L.B. 711.

A reading of the various opinions rendered in the case of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), makes it manifestly clear that the adoption of statutes such as Neb. Rev. Stat. § 29-2522 (Reissue 1979), and the provisions of L.B. 711, are simply a response to the United States Supreme Court's recognition that it is a violation of an individual's constitutional rights when the decision to execute is arrived at in an arbitrary and discriminatory manner. The fact that we may create criteria to aid us in imposing the death penalty does not overcome the constitutional prohibition if, after applying the formula, we nevertheless continue to impose the penalty in an arbitrary and capricious manner.

As noted by Mr. Justice Douglas in Furman, supra at 242: "The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application

do, or may, lead to quite different conclusions.

"It would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices."

And, further, in the same Furman decision we find the words of Mr. Justice Stewart, wherein he says at 390-91: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. [Citation omitted.] But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

An examination of but a few cases within this jurisdiction makes it clear that the imposition of the death penalty in the instant case is, indeed, arbitrary and capricious.

In State v. Scott, 200 Neb. 265, 263 N.W.2d 659 (1978), the defendant was charged with murder in the perpetration of or in an attempt to perpetrate a robbery. The evidence disclosed that the defendant entered the home of William and

Bertha McCormic in Omaha and demanded money at gunpoint. A scuffle ensued, Mr. McCormic was shot twice and killed, and Mrs. McCormic was shot twice and wounded. Mr. McCormic was 92 years of age at the time. Mrs. McCormic was 83, had impaired vision, and could not describe her assailant with any specificity. The defendant was sentenced to life imprisonment.

In State v. Prim, 201 Neb. 279, 267 N.W.2d 193 (1978), the defendant was charged with first degree murder, having shot and killed the defenseless operator of a gas station during the commission of a robbery. He was sentenced to life imprisonment.

In State v. Hatcher, unappealed to this court, the defendant, being pursued by a police officer, engaged in a struggle with the police officer, and as the officer struggled with the defendant the officer's gun went off twice, the second time hitting the officer in the head. The defendant was sentenced to life imprisonment.

In State v. Brown, unappealed to this court, the defendant killed his victim during a robbery. He was sentenced to life imprisonment.

In State v. Jimmy Ray Anderson, unappealed to this court, a 34-year-old defendant and his wife resisted arrest by a patrolman, and in the struggle in the police car the patrolman was shot and killed. The defendant was sentenced to life imprisonment.

In State v. Floyd, unappealed to this court, the defendant, 37 years old, shot and killed an unarmed gas station attendant during the course of a robbery. He was sentenced to life

imprisonment.

Each of those killings was senseless and unforgiving. Yet we, as courts, are required to be sure that the Constitution of both this state and the United States is always followed. regardless of other factors. Where the United States Supreme Court has declared that the arbitrary imposition of the death penalty violates the Constitution, we have no choice and may not approve the imposition of the death penalty when, as here, it appears to be arbitrarily imposed.

The words of Mr. Justice Marshall, joined by Mr. Justice Brennan, in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980), appear each day to be more applicable. Marshall said in Godfrey v. Georgia, supra at 438-39: "I believe that the death penalty may not constitutionally be imposed even if it were possible to do so in an evenhanded manner. But events since Gregg make that possibility seem increasingly remote. Nearly every week of every year, this Court is presented with at least one petition for certiorari raising troubling issues of noncompliance with the strictures of Gregg and its progeny. On numerous occasions since Gregg, the Court has reversed decisions of State Supreme Courts upholding the imposition of capital punishment, frequently on the ground that the sentencing proceeding allowed undue discretion, causing dangers of arbitrariness in violation of Gregg and its companion cases. These developments, coupled with other persuasive evidence, strongly suggest that appellate courts are incapable of guaranteeing the kind of objectivity and evenhandedness that the Court contemplated and hoped for in Gregg."

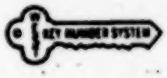
I would affirm the action of the trial court in denying postconviction relief except with regard to the matter of the death penalty. In that regard, I would order the appellant be incarcerated for the balance of his natural life.

APPENDIX B



death under count I to a sentence of life imprisonment.

AFFIRMED AS MODIFIED.



197 Neb. 528
STATE of Nebraska, Appellee,

v.

John Edward RUST, also known as John DeWitt, Appellant.

No. 40451.

Supreme Court of Nebraska.

Feb. 2, 1977.

Defendant was convicted in the District Court, Douglas County, Caniglia, Ronin and Warren, JJ., of murder committed in the perpetration of or attempt to perpetrate robbery and of maliciously shooting at three individuals with the intent to kill, wound, or maim said individuals, and defendant appealed. The Supreme Court, Clinton, J., held that death penalty statute was constitutional, that sentencing panel properly determined that there existed aggravating circumstances relating to defendant's previous conviction for assault with intent to inflict great bodily harm, commission of murder in effort to conceal identity of perpetrator, and murder committed by offender who knowingly created great risk of death to at least several persons; that sentencing panel properly determined that there existed the mitigating circumstance that crime was committed while defendant was under influence of extreme mental or emotional disturbance; and that existing aggravating factors outweighed any mitigating factor, so that death penalty was not excessive and not disproportionate to penalty imposed in other cases.

Affirmed.

1. Homicide ⇐18(5), 354

Killing in the perpetration of or the attempt to perpetrate a robbery is murder in the first degree and is punishable by death or imprisonment during life. R.R.S. 1943, § 28-401.

2. Criminal Law ⇐1213

Death penalty is not per se cruel and unusual punishment in violation of Eighth and Fourteenth Amendments to Constitution of United States and sections of Bill of Rights of State Constitution. U.S.C.A. Const. Amends. 8, 14; Const. art. 1, §§ 3, 9.

3. Criminal Law ⇐749

Neither Constitution of the United States nor State Constitution require determination by jury of applicability of aggravating and mitigating factors in determining under death penalty statute whether penalty shall be death or life imprisonment, and provisions for determination of penalty by trial judge or panel of judges after notice and hearing is constitutional. R.R.S. 1943, §§ 29-2522, 29-2523.

4. Criminal Law ⇐1213

Definitions of aggravating circumstances in death penalty statute are not too broad or vague and will be given a narrow construction and narrow application, and, as so construed and applied, are constitutional. R.R.S.1943, § 29-2523.

5. Criminal Law ⇐1208(1)

The term "substantial history" of serious assaultive or terrorizing criminal activity within meaning of aggravating circumstance subsection of death penalty statute does not include events or occurrences which are a part of the circumstance surrounding the current charge, but refers solely to earlier acts. R.R.S.1943, § 29-2523(1)(a).

See publication Words and Phrases for other judicial constructions and definitions.

6. Criminal Law ⇐1208(1)

A murder is committed to conceal commission of another crime, within meaning of aggravating circumstance listed in death penalty statute, when its purpose is to hide

fact that another crime has been committed. R.R.S.1943, § 29-2523(1)(b).

7. Homicide ⇐354

In prosecution for first-degree murder, sentencing panel properly found that defendants committed murder as part of their attempt to escape and in order to conceal their identity within meaning of aggravating circumstance set forth in death penalty statute. R.R.S.1943, § 29-2523(1)(b).

8. Homicide ⇐354

A murder is committed for pecuniary gain within meaning of aggravating circumstance listed in death penalty statute when murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds. R.R.S.1943, § 29-2523(1)(c).

9. Homicide ⇐354

Even though murder was committed as part of attempt to escape or to conceal identity of perpetrator of robbery and was intended to help defendant keep proceeds of robbery, murder was not committed for pecuniary gain within meaning of aggravating circumstance listed in death penalty statute. R.R.S.1943, § 29-2523(1)(c).

10. Criminal Law ⇐1208(1)

Definition of aggravating factors in death penalty statute will be construed so as not to overlap and so that same essential facts are not construed to constitute two or more aggravating circumstances; it is the apparent legislative purpose that each of the definitions convey a different concept. R.R.S.1943, § 29-2523.

11. Homicide ⇐354

A murder is especially heinous, atrocious, cruel or manifests exceptional depravity by ordinary standards of morality and intelligence within meaning of aggravating circumstances listed in death penalty statute when it involves torture, sadism, sexual abuse, or the imposition of extreme suffering, and this circumstance applies only to murder charge and not to collateral or subsequent circumstances; circumstance is satisfied where killing is so coldly calculated as to indicate state of mind totally and senselessly bereft of regard for human life. R.R.S.1943, § 29-2523(1)(d).

12. Homicide ⇐354

In prosecution for first-degree murder, sentencing panel properly found that aggravating circumstance applicable to murders which are especially heinous, atrocious, cruel, or manifest exceptional depravity by ordinary standards of morality and intelligence did not apply to murder committed by robber in his attempt to escape. R.R.S. 1943, § 29-2523(1)(d).

13. Homicide ⇐354

Aggravating circumstance listed in death penalty for murder committed at time offender also committed another murder does not include as "another murder" an attempt to commit murder. R.R.S.1943, § 29-2523(1)(e).

See publication Words and Phrases for other judicial constructions and definitions.

14. Criminal Law ⇐10

No act is a crime unless made so by statute.

15. Criminal Law ⇐1134(1)

Supreme Court will upon automatic review in capital cases compare case under consideration with other capital cases and determine in each instance whether death penalty is disproportionate.

16. Homicide ⇐18(5)

An accomplice in a robbery is not accountable for felony-murder in the death of one of his fellow participants who is shot and killed by police during robbery or during flight.

17. Homicide ⇐354

Where defendant shot at at least three police officers and wounded two of them and killed other individual, sentencing panel properly found presence of aggravating circumstance listed in death penalty statute applicable to cases in which offender knowingly created great risk of death to at least several persons. R.R.S.1943, § 29-2523.

**18. Homicide ⇐354**

Murder which is committed as part of an attempt by robbers to escape and avoid apprehension by law enforcement officers is committed to disrupt or hinder enforcement of laws within meaning of aggravating circumstance subsection of death penalty statute. R.R.S.1943, § 29-2523(1)(h).

**19. Homicide ⇐354**

In prosecution for first-degree murder, evidence supported finding of sentencing panel that murder was committed while offender was under influence of extreme mental or emotional disturbance within meaning of mitigating circumstances listed in death penalty statute. R.R.S.1943, § 29-2523(2)(c).

**20. Homicide ⇐354**

Mitigating factor listed in death penalty statute relating to age of the defendant at the time offense was committed did not apply to defendant who was 23 years of age at time of offense. R.R.S.1943, § 29-2523(2)(d).

**21. Homicide ⇐354**

In prosecution for first-degree murder, sentencing panel properly found that death penalty was appropriate for murder committed in attempt to flee scene of robbery, in view of existence of several aggravating factors, even though sentencing panel properly found that murder was committed while defendant was under influence of extreme mental or emotional disturbance. R.R.S.1943, § 29-2523(2)(c).

**22. Criminal Law ⇐1208(1)**

Aggravating circumstances listed in death penalty statute must be proved beyond a reasonable doubt. R.R.S.1943, § 29-2523.

*Syllabus by the Court*

1. The death penalty is not per se cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States and sections 3 and 9 of the Bill of Rights of the Constitution of Nebraska.

2. Neither the Constitution of the United States nor the Constitution of Nebraska require determination by a jury of the applicability of the aggravating and mitigating factors in determining under the provisions of sections 29-2522 and 29-2523, R.R.S.1943, whether the penalty shall be death or life imprisonment, and the provision for determination of the penalty by the trial judge or a panel of judges after notice and hearing is constitutional.

3. The definitions of aggravating circumstances in section 29-2523, R.R.S.1943, are not too broad or vague and will be given a narrow construction and narrow application, and as so construed and applied are constitutional.

4. The term "substantial history of serious assaultive or terrorizing criminal activity" within the meaning of aggravating circumstance subsection (1)(a) of section 29-2523, R.R.S.1943, does not include events or occurrences which are part of the circumstance surrounding the current charge, but refers solely to earlier acts.

5. A murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed.

6. A murder is committed for pecuniary gain when the murder itself is motivated primarily by desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds.

7. The definition of aggravating factors in section 29-2523, R.R.S.1943, will be construed so as not to overlap, that is, the same essential facts should not be construed to constitute two or more aggravating circumstances. It is the apparent legislative purpose that each of the definitions convey a different concept.

8. A murder is especially heinous, atrocious, cruel, or manifests exceptional depravity by ordinary standards of morality and intelligence within the meaning of aggravating circumstance subsection (1)(d), of section 29-2523, R.R.S.1943, when it involves torture, sadism, sexual abuse, or the imposition of extreme suffering. This cir-

cumstance applies only to the murder charged and not to collateral or subsequent circumstances. This circumstance is also satisfied where the killing is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life.

9. A conviction for another murder within the meaning of aggravating circumstance subsection (1)(a), of section 29-2523, R.R.S.1943, does not include an attempt to commit murder.

10. This court will, upon automatic review in capital cases, compare the case under consideration with other capital cases and determine in each instance whether the death penalty is disproportionate.

11. In Nebraska an accomplice in a robbery is not accountable for felony murder in the death of one of his fellow participants who is shot and killed by the police during the robbery or during flight.

12. Knowingly creating a risk of death to several persons includes the circumstance of shooting at several persons.

13. Murder which is committed as part of an attempt by robbers to escape and avoid apprehension by law enforcement officers is committed to disrupt or hinder the enforcement of laws within the meaning of aggravating circumstance subsection (1)(h) of section 29-2523, R.R.S.1943.

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Frank B. Morrison, Public Defender, Stanley A. Krieger, Asst. Public Defender, Omaha, David E. Kendall, Peggy C. Davis, New York City, Anthony G. Amsterdam, Stanford, Cal., for appellant.

Paul L. Douglas, Atty. Gen., Paul W. Snyder, Asst. Atty. Gen., Lincoln, for appellee.

Heard before WHITE, C. J., and SPENCER, BOSLAUGH, McCOWN, NEWTON, CLINTON and BRODKEY, JJ.

CLINTON, Justice.

The defendant, John Edward Rust, also known as John DeWitt, was found guilty by a jury of the following charges: (1) The killing of Michael Kellogg in the perpetration or attempt to perpetrate a robbery; (2) maliciously shooting at Russell Wolf with intent to kill, wound, or maim said individual; (3) maliciously shooting at George E. Allen with intent to kill, wound, or maim the said individual; and (4) maliciously shooting at Joseph Nepodal with intent to kill, wound, or maim said individual. He was sentenced by the trial judge on the last three charges to concurrent terms of not less than 16⅔ and not more than 50 years in the Nebraska Penal and Correctional Complex. In accordance with the provisions of section 29-2520, R.R.S.1943, a panel of three District Judges, including the judge who presided at the trial, was convened for the purpose of determining the sentence on the murder charge and, after notice and hearing as provided by section 29-2521, R.R.S.1943, the defendant was sentenced to death for the murder. At the sentencing hearing evidence was adduced by both the State and the defendant. Following the hearing and argument, the sentencing panel made findings in writing in accordance with the provisions of sections 29-2522 and 29-2523, R.R.S.1943. Automatic review of the death sentence has come to this court on the murder charge under the provisions of sections 29-2525 and 29-2524, R.R.S.1943. No appeal has been taken on the other three counts.

[1] Killing in the perpetration of or the attempt to perpetrate a robbery is murder in the first degree and is punishable by death or imprisonment during life. § 28-401, R.R.S.1943. That statute provides that the punishment shall be determined in the manner provided by sections 29-2520 to 29-2524, R.R.S.1943.

[2-4] Defendant is represented by counsel in this court and on his behalf they make the following assignments of error: (1) The death penalty provided by section 28-401, R.R.S.1943, is unconstitutional in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States, and Article I, sections 3 and 9, of the Bill of Rights, of the Constitution of Nebraska, because such sentences are

arbitrarily and capriciously imposed in violation of the mandates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. (2) Capital punishment constitutes cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the Constitution of the United States and Article I, section 9, of the Bill of Rights, of the Constitution of Nebraska, irrespective of the manner of imposition or how determined. (3) Capital punishment is unconstitutional because a jury determination of the applicability of the aggravating and mitigating factors under sections 29-2522 and 29-2523, R.R.S.1943, is not mandated by our statute. (4) The panel of sentencing judges misapplied the aggravating and mitigating factors in this case. (5) The statutory definitions of aggravating and mitigating factors under section 29-2523, R.R.S. 1943, are so vague and indefinite as to be unconstitutional. (6) The death sentence is excessive in this particular case. (7) The trial court erred in (a) not separating the jurors during their voir dire examination; (b) in not sequestering the jury during trial; (c) in denying a request for a continuance; and (d) in denying a request for change of venue.

Assignments (1), (4), and (5) are melded in defendant's argument and all must be covered here even though an assignment comparable to (1) has been covered in *State v. Simants*, Neb., 250 N.W.2d 881. Assignments (2) and (3) have been adequately dealt with in *Simants*, and the opinion of the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, fully answers these contentions and they need not be further discussed in this opinion. Determination of the other assignments requires that we briefly summarize the evidence and other pertinent background.

On February 21, 1975, the defendant and two companions, Ronald Raymond Ell and Donald D. Fread, robbed at gunpoint employees of the Hinky Dinky store at 30th and Weber Streets in Omaha, Nebraska. The robbers fled in an automobile. Almost immediately police were alerted and a chase ensued, during which Rust was observed firing at the police cruisers. Two cruisers were struck by the bullets. The cruiser driven by officer Allen was hit by two bullets which passed through the front windshield. Another cruiser driven by officer Nepodal was hit by a bullet which passed through the left rear quarter panel and backseat, and lodged in the right rear door. During the chase the robbers' car became trapped on a residential street when police vehicles blocked both forward progress and retreat.

At that time the robbers' car became stuck in a snowbank. Fread, who was the driver of the get-away car, was shot and killed by the police near the point where the car stopped. Rust and Ell left the car on foot. Police officers Wolf, Allen, and Nepodal, who were the victims named in counts 2, 3, and 4, and others pursued them. Rust continued the fire fight and shot Kellogg, a civilian who had come to the aid of the police. Officer Wolf was severely wounded by Rust. Officer Allen suffered a slight wound. The evidence showed that Ell hid in some bushes adjacent to a residence and surrendered when ordered to do so. Rust took refuge in a backyard and continued to fire at the officers until he was himself wounded. The evidence, both eyewitness and ballistic, showed that Kellogg was killed by Rust and that the bullet which came from his gun was the one that lodged in the police cruiser driven by Nepodal. Kellogg was shot by Rust four times and he was observed to be shooting into Kellogg's body after Kellogg had fallen as a result of an earlier shot fired by Rust.

The sentencing hearing was held in two stages. At the first stage documentary evidence was introduced, including copies of the record of the trial and a record of Rust's conviction and sentence in 1969 in South Dakota on charges of assault with intent to do great bodily harm and of grand larceny. The conviction arose out of a brutal assault with a tire iron and placing a chain about the victim's neck. Rust served about 5 years of a 10-year term on these two charges and was then paroled. Before

the second stage, the trial record was read by the two judges who were not present at trial.

At the second stage of the sentencing hearing, Rust's mother testified on behalf of the defense. The substance of this testimony was to place blame for Rust's antisocial attitude upon events occurring during an unhappy childhood. The mother testified that as a small child Rust suffered from an eye defect and during his early years was rather clumsy. At about the age of 5 he suffered a fall and lost the sight of one eye completely. As a consequence of this accident and his previous eye impairment, he had difficulty in school and was abused by other children. At about age 10 while Rust was still in grade school, a younger brother, who at the time was under Rust's charge, was struck and killed by an automobile while crossing a street. Apparently Rust's father, to whom young Rust was much attached, admonished him and Rust thereafter blamed himself for his brother's death. Shortly thereafter his father died. Rust had indicated to his mother that he felt responsibility for his father's death as well. Rust dropped out of high school in his junior year. At the time of commitment on the South Dakota charges he was about 18 years of age and on February 1, 1975, his age was apparently approximately 23 years and 6 months.

We first direct our attention to assignments (1), (4), and (5). The defendant argues that the Nebraska death sentence procedure cannot and, in fact, does not eliminate discriminatory, arbitrary, and capricious decisions by judges, and that the result is that the application of the guidelines cannot be sanctioned under the principles established by the Supreme Court of the United States in *Furman v. Georgia*, *supra*. This argument is founded upon the contention that the definitions of aggravating and mitigating circumstances are vague and indefinite. Defendant points to alleged different and conflicting interpretations made by various District Judges and panels of judges in applying the statutes in the various capital cases now before us as well as in other cases where capital punishment might have been imposed but was not. He makes special reference to the case of Ronald Ell, one of Rust's accomplices, who received only a life sentence. See *State v. Ell*, 196 Neb. 800, 246 N.W.2d 594.

As pointed out in *Simants*, section 29-2522, R.R.S.1943, provides that after evidence and argument the judge or panel of judges shall fix the sentence either at death or life imprisonment and shall base its determination upon whether the specified aggravating circumstances exist to justify the imposition of the sentence, or whether mitigating circumstances exist which approach or exceed the weight given to aggravating circumstances. Section 29-2523, R.R.S. 1943, defines eight aggravating circumstances identified by the letters (a) through (h) inclusive and seven mitigating circumstances identified by letters (a) through (g) inclusive.

[5] Aggravating circumstance (a) is as follows: "The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity." § 29-2523, R.R.S.1943. The sentencing panel found that (a) applied in this case because of the defendant's conviction in South Dakota of the assault with intent to inflict great bodily harm. In *State v. Ell*, *supra*, the sentencing judge found that aggravating circumstance (a) did not apply. The defendant claims there is an inconsistency in the findings. There is none. The record establishes that Ell had not been convicted of any crime of violence. The record in that case merely showed that he was *wanted* in South Dakota on such a charge. There was in the *Ell* case no proof of actual guilt. Defendant also notes that the court pointed out in *Ell* that Ell fired at police officers during an attempt to escape. He claims that this is inconsistent with the findings in the present case. The acts described are clearly terrorizing acts, but they were part of the acts of which Ell was then being tried. We interpret "*substantial history* of serious assaultive or terrorizing

criminal activity" to refer to events and incidents prior to and not part of the events out of which the current charge arises. The use of the term "history" clearly implies earlier events. See *State v. Holtan*, Neb., 250 N.W.2d 876. As so interpreted we believe that the definition of aggravating circumstance (a) is clear. The panel did not misapply that aggravating circumstance in this case, nor in *Ell*.

The defendant next asserts that the sentencing judge in *State v. Stewart*, Neb., 250 N.W.2d 849, in discussing the first aggravating circumstance, seemed to consider activities which were part of the events charged as "history of serious assaultive or terrorizing activity," because it considered the attempt of Stewart to kill another individual at the time he killed the victim of whose murder he was convicted. Pursuant to the construction of the term "history" adopted in this case and in *Holtan*, we have this day held in *Stewart* that aggravating factor (a) was not applicable in that case.

The defendant says that his contention of vagueness of definition and arbitrariness of application as applied to aggravating circumstance (a) is supported by inconsistent interpretations and contrary applications by the sentencing judge in *Simants* and the sentencing panel in *Holtan*. Whatever merit this contention may have had has now been removed by our opinions in those cases and in this one. In *Simants* we have today upheld the finding of the sentencing judge that aggravating circumstance (a) did not exist. In that case the sentencing court applied the construction which we have here approved, that is, that activities associated with the crime in which sentence is being imposed is not "history." Today in *Holtan* we have eliminated consideration of the associated offense of shooting with intent to kill, wound, or maim which occurred in connection with the murder. There existed, however, in *Holtan* previous convictions of crime involving violence and threats of violence to persons and so, as the opinion in *Holtan* points out, the finding of the panel was supported by the evidence.

[6, 7] In this case the panel found that aggravating circumstance (b) did exist, that is, "The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime." § 29-2523, R.R.S. 1943. In the case before us the robbers were masked, they were apparent strangers in the neighborhood, and the murder was part of the attempt to escape and so part of the effort to conceal their identity. The finding of the panel on circumstance (b) was correct. However, we think that the panel was wrong in finding that the murder was committed to conceal the commission of another crime. The murder could not have concealed the commission of the crime or of the assaults because it did not destroy or was not an attempt to destroy evidence of those crimes. Their discovery could not have possibly been prevented by the murder of Kellogg. The other crimes were, in fact, already known. We hold that a murder is committed to conceal the commission of another crime when its purpose is to hide the fact that another crime has been committed as, for example, in a case where murder by arson is committed in an effort to conceal the evidence of commission of another crime, e. g., another murder or burglary, or where the murder of a witness is likely to prevent the discovery of a prior crime not otherwise likely to be discovered.

[8-10] In this case the panel found that aggravating circumstance (c) did not exist. That is, that the murder was not committed for hire, or for pecuniary gain, nor had the defendant hired another to commit the murder for the defendant. The panel properly applied this criteria and its finding was correct. The defendant argues, however, that in *Stewart* the sentencing judge applied an interpretation of the definition which is inconsistent with that applied in this case. That is, it determined that, since part of the motivation for the crime was to avoid having to pay for a quantity of marijuana, aggravating circumstance (c) existed. This contention is answered by our finding today in *Stewart* that this aggravating circumstance did not exist in that

case. We construe this factor to apply (1) to the hired gun, (2) to the hirers of the gun, and (3) to murder motivated primarily by a desire for pecuniary gain as in the case of a murder of an insured by the beneficiary of a life insurance policy for the purpose of obtaining the proceeds, or the murder of a testator by a legatee or devisee to secure a legacy or a devise. Where, as here, the murder was committed as part of an attempt to escape or to conceal the identity of the perpetrator, we do not consider the murder was committed for a pecuniary gain even though the result could possibly have been to enable Rust to keep the proceeds of the robbery. We think it is not reasonable to construe the definitions in such a manner as to make them overlap and make the same identical facts constitute two aggravating circumstances.

We believe the Legislature intended by each definition to convey a different concept, at least to the extent that some added different and important element, e. g., motive or purpose, is included in each separate definition even though some fact or facts in a particular case may pertain to more than one of the definitions, e. g., pecuniary gain may be the result. This principle is also illustrated by our holding in *Simants* where the multiple murders satisfy aggravating circumstance (e), but are not construed to also include circumstance (f), i. e., "created a great risk of death to at least several persons."

[11, 12] In this case the court found that aggravating factor (d) did not exist. That factor is: "The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence." The sentencing panel in its findings stated: "We recognize that all first degree murder crimes are capable of being accurately characterized by one or more of the descriptive adjectives employed, but by the use of the words 'especially' and 'exceptional' the legislature has required a much greater degree of these characteristics than is usually present in a murder. This category of aggravating circumstances would include murders involving torture, sadism, sexual abuse, or the imposition of extreme suffering. Here the murder was effected by three bullets causing almost instantaneous death and the imposition of extreme suffering on the victim was not involved. It is a close question as to whether this particular aggravating circumstance exists. In view of our foregoing interpretation of the application of this aggravating circumstance, we find this aggravating circumstance does not exist." We think the panel properly interpreted and applied the definition in this case. See *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, where the United States Supreme Court approved a similar construction of substantially the same guideline by the Supreme Court of Florida and said: "We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." The defendant argues, however, that the sentencing court in Stewart applied a contrary interpretation and made finding inconsistent with the interpretation. In *Stewart*, death was instantaneous by reason of a gunshot wound to the head. The circumstances surrounding the murder were gruesome, that is, the attempt to burn the body of the victim as well as of an unconscious person who recovered consciousness and escaped. Had the attempt to commit the second murder in *Stewart* succeeded and the victim died an agonizing death by burning, then no doubt as to the second murder a finding that circumstance (d) existed would have been supportable. Circumstance (d) by its literal terms applies only to the murder actually committed and we so construe it.

Today in *Holtan* we have also said that aggravating circumstance (d) exists where the murder is so coldly calculated as to indicate a state of mind totally and senselessly bereft of regard for human life.

[13] The panel found that aggravating circumstance (e) did not exist. That circumstance is: "At the time the murder was committed, the offender also committed another murder." § 29-2523, R.R.S.1943.

The finding was proper. The standard is unambiguous and needs no construction. The defendant argues, however, that the sentencing judge in *Stewart* construes circumstance (e) to pertain to *attempts* to murder committed at the same time as the murder for which the sentence was imposed. We agree such a construction is improper. We have this day set aside the death sentence in *Stewart* and in so doing pointed out that the trial court misconstrued aggravating circumstance (e) in that case.

[14-16] The defendant also argues that the imposition of the death sentence in his case is arbitrary and discriminatory because in *State v. Ell, supra*, only a life sentence was imposed, yet Ell was, as an aider and abettor, guilty not only of the murder of Kellogg, but also of the murder of Fread, his accomplice, who was killed by the police. The defendant apparently relies upon a rule which we find in an opinion of the Supreme Court of Pennsylvania, *Commonwealth v. Thomas*, 382 Pa. 639, 117 A.2d 204, where it was held that a participant in a robbery was accountable for felony murder in the death of an accomplice shot by the victim of the robbery during the escape. There are at least two responses to this contention. (1) This court has never adopted any such theory of felony murder and it is not likely to. Such a theory would constitute an extension of the statute and no act is a crime in Nebraska unless made so by statute. (2) The Supreme Court of Pennsylvania has since disapproved its previous holding. *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472. It appears that only one state follows any such theory. *Taylor v. Superior Court*, 3 Cal.3d 578, 91 Cal.Rptr. 275, 477 P.2d 131.

Additionally in *State v. Ell, supra*, there existed another mitigating factor. Ell, after leaving the auto, abandoned the flight and surrendered when ordered to do so. He was guilty of the murder of Kellogg only as an aider and abettor. He did not actually kill anyone. Although he was equally guilty with Rust in the robbery, his participation in the actual killing was relatively minor. See mitigating factor (e), § 29-2523, R.R.S.1943.

[17] The sentencing panel found that aggravating circumstance (f) did exist. That circumstance is: "The offender knowingly created a great risk of death to at least several persons." § 29-2523, R.R.S. 1943. As the previously recited facts show, this finding was proper. The defendant shot at at least three police officers, wounding two of them. Further elaboration is not required. See our construction of definition (f) in *State v. Simants, supra*. The defendant's argument founded upon an inconsistent interpretation of (f) in *State v. Stewart, supra*, has been dealt with in our opinion in that case.

The sentencing panel found that aggravating circumstance (g) did not exist. Circumstance (g) is: "The victim was a law enforcement officer or a public servant having custody of the offender or another." § 29-2523, R.R.S.1943. The victim Kellogg was not a police officer. The language is unambiguous. It requires no construction or interpretation.

[18] The panel found that circumstance (h) did exist. That definition is: "The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws." § 29-2523, R.R.S.1943. As the sentencing panel pointed out in its findings, the murder of Kellogg was committed in an attempt to avoid capture and this was part of an attempt to prevent the apprehension and arrest by law enforcement officers of the defendant and his companion Ell. It is the fact that the murder of Kellogg was a part of the defendant's resistance to his capture and arrest which makes circumstance (h) applicable in this case. Such an act, in our judgment, clearly comes within the definition of aggravating circumstance (h). Defendant points out, however, that the sentencing judge in *Stewart* construed the murder alone as an attempt to conceal the crime, thus satisfying definition (h). We have this day dealt with that matter in the *Stewart* opinion and need not mention it again here.

We now turn to a consideration of the defendant's contentions with reference to the findings by the panel on the mitigating factors. The panel found that mitigating circumstances (a), (b), (d), (e), (f), and (g) did not exist. The defendant does not challenge these findings.

[19] The panel did find that mitigating circumstance (c) did exist, that is, "The crime was committed while the offender was under the influence of extreme mental or emotional disturbance." § 29-2523, R.R.S.1943. In this connection the panel pointed out that events of the defendant's childhood had contributed to a basic emotional instability in the defendant; that at the time of the murder of Kellogg the defendant was cornered and trapped and had been shot at by Kellogg; and that the defendant's basic emotional instability and the existing circumstances made the crime one of strong emotion and not one of cold calculation. The evidence supports such a fact finding.

[20] The defendant argues, however, that the definition of mitigating circumstances is subject to the same indefiniteness which he claims for the aggravating factors and he bolsters his argument insofar as it pertains to circumstance (d), the age of the defendant, by pointing out that in *Stewart* the sentencing judge imposed the death penalty and that in *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8, involving a similar crime, the defendant received life imprisonment. In one case sentencing authority found age was a mitigating factor and in the other case it found that it was not. In this case the defendant was fully matured and 23 years of age. Any force that the defendant's argument has with reference to the *Stewart* and *McDonald* cases has this day been removed by our reducing the sentence in *Stewart* to life imprisonment and our finding that age was a mitigating factor in that case.

[21] We fully agree with the sentencing panel that the existing aggravating factors in this case clearly outweigh any mitigating factor. We further conclude that the death penalty under the facts in this case is not excessive and is not disproportionate to that imposed in the other cases before us.

We now turn to the defendant's last assignment relating to the overruling of various motions. Rust and his accomplice Ell were tried together in the District Court. Substantially the same motions were made by both defendants. The record applicable to these motions as to both defendants is the same identical record. There was no difference in the facts as to either defendant. These motions were thoroughly considered and determined in *Ell*. The result must be the same in this case. Defendant's last assignment is not meritorious.

[22] We have today held in *Simants*, in response to a constitutional challenge, that the facts upon which the applicability of an aggravating factor depends must be proved beyond a reasonable doubt. We are satisfied from our review of the evidence in this case that the facts upon which the finding of the existence of each aggravating factor depends was proved beyond a reasonable doubt and so find. In making such finding we have applied the same standard of reasonable doubt as applicable to the burden of proof in criminal cases. NJI No. 14.08. See, *State v. Rice*, 188 Neb. 728, 751, 199 N.W.2d 480; *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065.

AFFIRMED.

197 Neb. 544

**STATE of Nebraska, Appellee,**

**v.**

**Richard D. HOLTAN, Appellant.**

**No. 40638.**

Supreme Court of Nebraska.

Feb. 2, 1977.

Defendant was convicted in the District Court, Douglas County, Caniglia, Ro-

# APPENDIX C

**28-303. Murder in the first degree; penalty.** A person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (3) by administering poison or causing the same to be done; or if by willful and corrupt perjury or subornation of the same he purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2520 to 29-2524.

**29-2519. Statement of intent.** The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-303 fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefore determines that the death penalty should be imposed only for the crimes set forth in section 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524.

**29-2520. Murder; person found guilty; sentence; determination.** Whenever any person is found guilty of a violation of section 28-303, the district court shall within seven days fix a date for hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered.

**29-2521. Determination of sentence; procedure.** In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 29-2523. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

**29-2521.01. Legislative findings.** The Legislature hereby finds that:

(1) Life is the most valuable possession of a human being, and before taking it, the state should apply and follow the most scrupulous standards of fairness and uniformity;

(2) The death penalty, because of its enormity and finality, should never be imposed arbitrarily nor as a result of local prejudice or public hysteria;

(3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion;

(4) Charges resulting from the same or similar circumstances have, in the past, not been uniform and have produced radically differing results; and

(5) In order to compensate for the lack of uniformity in charges which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze all criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

**29-2521.02. Criminal homicide cases: review and analysis by Supreme Court: manner.** The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze all cases involving criminal homicide committed on or after April 20, 1973. Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) the charges filed, (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

**29-2521.03. Criminal homicide cases: appeal: sentence: Supreme Court review.** The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

**29-2521.04. Criminal homicide cases: Supreme Court review and analyze: district court: provide records.** Each district court shall provide all records required by the Supreme Court in order to conduct its review and analysis pursuant to sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.

**29-2522. Sentence; death; life imprisonment; determination of death in writing.** After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

**29-2523. Aggravating and mitigating circumstances, defined.** The aggravating and mitigating circumstances referred to in sections 29-2521 and 29-2522 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

**29-2524. Existing procedures: act does not repeal.** Nothing in sections 24-342, 28-303, 28-313, 29-2519 to 29-2546 and sections 29-2521.01 to 29-2521.04 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment.

**29-2524.01. Criminal homicide: report filed by county attorney: contents.** Each county attorney shall file a report with the State Court Administrator for each criminal homicide case filed by him. The report shall include (1) the initial charge filed, (2) any reduction in the initial charge and whether such reduction was the result of a plea bargain or some other reason, (3) dismissals prior to trial, (4) outcome of the trial including not guilty, guilty as charged, guilty of a lesser included offense, or dismissal, (5) the sentence imposed, (6) whether an appeal was taken, and (7) such other information as may be required by the State Court Administrator. Such report shall be filed not later than thirty days after ultimate disposition of the case by the court.

**29-2524.02. State Court Administrator: criminal homicide report: provide forms.** The State Court Administrator shall provide all forms necessary to carry out sections 29-2524.01 and 29-2524.02.

**29-2525. Punishment is capital: appeal: clerk of district court: transcript: prepare: file: no charge: Clerk of Supreme Court: writ of error: issue.** In cases when the punishment is capital, no petition in error shall be required and within the time prescribed by section 25-1931 for the commencement of proceedings for the reversing, vacating, or modifying of judgments, the clerk of the district court in which the conviction was had shall prepare and file with the Clerk of the Supreme Court a transcript of the record of the proceedings, for which no charge shall be made. The Clerk of the Supreme Court shall, upon receipt of the transcript, issue a writ of error. Such writ shall be returnable before the Supreme Court and the payment of a docket fee shall not be required.

CONSTITUTION OF THE STATE OF NEBRASKA

ARTICLE I

Sec. 9. Bail; fines; imprisonment. All persons shall be bailable by sufficient sureties, except for treason, sexual offenses involving penetration by force or against the will of the victim, and murder, where the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. (Amended, 1978.)

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

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JOHN E. RUST,

Petitioner,

v.

THE STATE OF NEBRASKA,

Respondent.

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IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEBRASKA

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PAUL L. DOUGLAS
Attorney General for the State of Nebraska

J. KIRK BROWN
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2682

Attorneys for Respondent

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I.

OPINION BELOW

State v. Rust, 208 Neb. 320, 303 N.W.2d 490 (1981).

II.

JURISDICTION

Opinion here in question filed, March 20, 1981.

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the relevant citations.

IV

QUESTIONS PRESENTED

The respondent accepts the petitioner's statement of the questions presented.

V.

STATEMENT OF THE CASE

The respondent accepts the petitioner's statement of the case.

VI.

ARGUMENT

A.

THE STATE COURT'S FINDINGS OF FACT SHOULD BE RESPECTED.

The petitioner is now attempting to escape ultimate responsibility for the act which a jury found beyond a reasonable doubt he had committed, based upon the exculpatory testimony, at the post-conviction hearing, of a Mr. Ells, his partner in crime. The petitioner claims Ells' testimony was inherently credible. The state trial court found to the contrary and the Nebraska Supreme Court affirmed that finding. In such factual determinations deference should be paid to the fact finder's enhanced opportunity to observe the witness and evaluate his testimony. In Glasser v. U.S., 315 U.S. 60 (1942), this court stated, "It is not for us to weigh the evidence or to determine the credibility of witnesses. The

verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." Id. at 80. We believe there to be substantial evidence to uphold the sentence announced by the court.

B.

THE RESPONSIBILITY FOR INTERPRETING STATE LEGISLATIVE ENACTMENTS RESTS WITH THE STATE COURTS.

This is not the proper forum in which to review the interpretation of a state legislative enactment by that state's highest court. Yet, that is exactly what the petitioner requests this court to undertake with respect to Neb.Rev.Stat. §29-2521.01, et seq. (Reissue 1979). Questions concerning the interpretation of that enactment have been resolved in State v. Holtan, 205 Neb. 314, 287 N.W.2d 671 (1980), cert denied, ___ U.S. ___, 66 L.Ed.2d 117 (1980).

The appropriate question may be whether the penalty of death was properly imposed by the State of Nebraska in the petitioner's case. Nebraska has enacted and employs a complex sentencing scheme in order to avoid the arbitrary imposition of this penalty. The petitioner has enjoyed the full benefits of that system. Multiple petitions for certiorari to this court have yet to result in a finding that further review of Nebraska's sentencing scheme is necessary. To the extent that the petitioner articulates an issue appropriate for consideration in this forum, he fails to indicate that any infringement of his rights has occurred. So long as the State of Nebraska accurately applies a constitutionally adequate sentencing procedure, we fail to see how the petitioner has been prejudiced.

II.

A.

THE AGGRAVATING AND MITIGATING CIRCUMSTANCES TO BE CONSIDERED IN A DEATH PENALTY CASE, AS DEFINED BY THE NEBRASKA SUPREME COURT, ARE CONSTITUTIONALLY ADEQUATE.

The petitioner claims that the mitigating and aggravating circumstances specified in Neb.Rev.Stat. §29-2523 (Reissue 1979) are vague and indefinite. The Nebraska Supreme Court

has had several opportunities to review and discuss the circumstances. The court has concluded that the enumerated circumstances are not unconstitutionally vague. State v. Stewart, 197 Neb. 497, 250 N.W.2d 849 (1977); State v. Rust, 197 Neb. 528, 250 N.W.2d 867 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 381 (1977); State v. Holtan, 197 Neb. 544, 250 N.W.2d 876 (1977). In each of these cases, the Nebraska Supreme Court discussed the specific aggravating and mitigating circumstances of §29-2523. The court clearly defined and explained the permissible boundaries of each and every one of these factors. We believe if the language of these cases is reasonably applied to the language of the statute, they become as precise as it is possible for words to be. None of the above cases have been granted relief by this Court upon a petition for writ of certiorari. We believe the wording and interpretation of all the aggravating and mitigating circumstances are sufficiently definite to meet any and all constitutional tests.

B.

THE MITIGATING CIRCUMSTANCES WHICH MAY BE CONSIDERED BY THE SENTENCING COURT ARE NOT LIMITED BY STATUTE.

The Nebraska statutes here in question provide for the adequate consideration of any mitigating circumstance and comply with the rulings of this Court in Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978). While §29-2523 sets out specific aggravating and mitigating circumstances which are to be considered by the court prior to passing sentence, §29-2523 provides:

> In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 25-2523. Any such evidence which the court deems to have probative value may be received. . . . (Emphasis added).

Lockett v. Ohio, supra, requires that the statutes in question not preclude a sentencing court from considering any aspect of a defendant's character as mitigating. The sections of the Nebraska statutes here in question do not, on their face or as interpreted by our state's supreme court, preclude the

consideration of such evidence. State v. Holtan, Id. 205 Neb. at 318.

The evidence which the petitioner sought to introduce as a mitigating circumstance was accepted and considered by the sentencing court. The sentencing court, however, evidently failed to find that the evidence offered "approach[ed] or exceeded the weight given to the aggravating circumstances." §29-2522.

C.

SO LONG AS CONSTITUTIONALLY ADEQUATE CRITERIA ARE ACCURATELY APPLIED BY THE SENTENCING ENTITY, THE COMPOSITION OF THAT ENTITY DOES NOT RAISE ISSUES OF A CONSTITUTIONAL MAGNITUDE.

The petitioner questions the propriety of the statutory mechanism in Nebraska which allows the determination of the penalty to be imposed upon a person found guilty of murder in the first degree to be made by the presiding judge or, upon the presiding judge's request, by a panel of the presiding judge and two additional judges designated by the chief justice of our state supreme court. Neb.Rev.Stat. §29-2520 (Reissue 1979). The petitioner claims that this procedure violates his rights to due process and equal protection of the laws. However, the petitioner cites absolutely no authority for this proposition.

The procedures established by the Nebraska statutes for the possible imposition of the death penalty have not been found to be constitutionally deficient in any respect. The statutes establishe criteria to be considered (§§29-2521 and 29-2523) and the balancing to occur between them (§29-2522). Section 29-2522 further provides:

> In each case in which the court imposes the death sentence, the determination of the court shall be in writing and shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring to the aggravating and mitigating circumstances involved in its determination.

These requirements are applicable regardless of whether the presiding judge or the three-judge panel is determining the sentence.

It is important to note that the petitioner does not here challenge the standards under which the sentencing decision is made in this state. If the standards applied are not challenged and the application of those standards must comply with the provisions of §29-2522 regardless of the make-up of the sentencing forum, we simply fail to see any merit to the petitioner's assertions.

Finally, the petitioner's contention that the decision regarding the composition of the sentencing entity is not reviewable on appeal is unfounded. Although the decision to call a panel rests within the trial court's discretion, we are aware of no reason that such a decision could not be challenged on appeal. However, the petitioner did not raise that issue on his appeal.

III.

THE CAPITAL SENTENCING PROCEDURES ADOPTED BY THE NEBRASKA LEGISLATURE IN RESPONSE TO FURMAN HAVE ELIMINATED THE DANGERS OF ARBITRARINESS AND CAPRICE IN SENTENCING THAT WERE HELD IN FURMAN TO BE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Furman, supra, decision while not holding that the death penalty was per se violative of the United States Constitution, did recognize that the penalty of death was different in kind from any other punishment imposed under our system of criminal justice. It was clear that the court in Furman held that the death penalty could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. In that opinion, Mr. Justice White concluded that:

> . . . the death penalty is exacted with great infrequency even for the most atrocious crime and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

(408 U.S. at 313.)

Also in the Supreme Court's decision in Furnam it was said:

> The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

(408 U.S. at 309-310.)

Furman mandates that where discretion is afforded a sentencing body on an issue so grave as the determination of whether or not a defendant's life should be taken or a term of imprisonment imposed, that discretion must be appropriately guided and directed so as to minimize the risk of wholly arbitrary and capricious action. The Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1976), said:

> . . . We have long recognized that '[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and the propensities of the offender.' . . .

(Id. at 187.) The Supreme Court in Gregg, supra, after discussing the vital need for accurate sentencing information said:

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevan to the imposition of sentence and to provide with standards to guide its use of the information.

(Id. at 195.)

Having been shown that the constitutional objections expressed in Furman can be satisfied by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with statutes to guide its use of the information, it now becomes necessary to determine whether or not the Nebraska sentencing procedures meet the objections expressed in Furman. On July 2, 1976, the same day that the United States Supreme Court decided the previously mentioned case of Gregg v. Georgia, supra, this court also decided the case of Proffitt v. Florida, 428 U.S. 242 (1976). In the Proffitt case, this court upheld the Florida procedures for imposition of the death penalty as against the allegations that it was constitutionally infirm. The Florida procedure is very similar to that procedure enacted by the Nebraska Legislature. The only significant difference is that in the

Florida procedure the jury, at the conclusion of the hearing, is directed to consider, "whether sufficient mitigating circumstances exist . . . which outweigh aggravating circumstances found to exist; and . . . [b]ased on those considerations, whether the defendant should be sentenced to life or death." In Florida, the jury's verdict is determined by a majority vote. The jury's decision as to the imposition of the death penalty is only advisory; the actual sentence, as under Nebraska procedure, is determined by the trial judge. Under the Florida procedures the trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed. As in Nebraska's procedure, the trial court in Florida whenever it imposes a sentence of death is required to set forth in writing the findings upon which the sentence of death is based as to the fact that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. The Florida procedure, also like Nebraska's procedure, provides for an automatic review by the state supreme court.

The Court in Proffitt v. Florida, supra, said:

> Under Florida's Sentencing Procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. . . .

Id. at 253. This court concluded that:

> . . . [I]n Florida, as in Georgia, it is no longer true that there is 'no meaningful basis for distinguishing a few cases in which [the death penalty] is imposed from the many cases where it is not.' [Citations omitted.] On its face, the Florida system thus satisfies the constitutional deficiencies identified in Furman.

Id.

The petitioner argues that the new Nebraska sentencing procedures do not eliminate the arbitrary infliction of death that was condemned in Furman. The petitioner notes that on the face of the statute, the death sentence is not mandatory. The state does not argue that point and would point out that the United States Supreme Court in Woodson v. North Carolina,

428 U.S. 280 (1975), and Roberts v. Louisiana, 428 U.S. 325 (1975), held that mandatory death statutes which treat all persons convicted of a designated offense as members of an undifferentiated class and not as individuals were constitutionally infirm. The newly enacted Nebraska statutes specifically give the sentencing authority discretion in its decision to impose the death sentence or a sentence of life imprisonment, however, the Legislature did establish mandatory standards which serve to guide the sentencing court's discretion. Just such a procedure was affirmed in Proffitt v. Florida, supra.

B.

WE BELIEVE THE PETITIONER'S CONCERNS REGARDING THE ISSUE OF COMPARATIVE SENTENCING HAVE ALREADY BEEN ADDRESSED IN ARGUMENT I.B. OF THIS BRIEF.

The petitioner argues that he is somehow denied due process where he is not informed of the aggravating circumstances to be argued by the state. He states no direct authority for that proposition, nor are we aware of any. The duty of the defense is to present all mitigating factors possible. We fail to see how that burden could be reduced by affording the appellant the process he argues for here. There is no indication or argument that the statutory procedures were not complied with in the courts below.

IV.

A.

NEBRASKA'S DEATH PENALTY DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

Petitioner's arguments I and IV complain that the death penalty, as a possible sentence under the Nebraska statutes, constitutes cruel and unusual punishment. This court in Furman v. Georgia, 408 U.S. 238 (1972), did not hold that the imposition of the death penalty in all circumstances offends the Eighth Amendment.

On July 2, 1976, this court in the case of Gregg v. Georgia, 428 U.S. 153 (1976), finally resolved the issue of whether or not capital punishment is per se "cruel and unusual" punishment. This court said:

> We hold that the death penalty is not a form of punishment that may never be imposed regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

Id. at 187.

This court found, in assessing a punishment selected by a democratically elected Legislature against the constitutional standard, that the validity of the punishment must be presumed. This court indicated that this was true partly because the constitutional test is intertwined with an assessment of contemporary standards and that in a democratic society legislatures, not courts, are constituted to exhibit the moral values of the people. Although an attempt was made to repeal the death penalty in Nebraska, the final result of that process left the death penalty in effect.

B.

DEATH BY ELECTROCUTION IS CONSTITUTIONAL.

The petitioner asserts that death by electrocution is unconstitutional. He cites no legal authority to support this conclusion. Punishment is cruel when it involves torture or lingering death. Inflicting the punishment of death by electricity has long been recognized within the legitimate sphere of legislative power of the state. Ex parte Kemmler, 136 U.S. 436 (1890). The proper mode for implementing change here would be in the legislative arena.

V.

THE APPELLANT WAS NOT DENIED ADEQUATE ASSISTANCE OF TRIAL COUNSEL.

The record of this case fails to contain adequate evidence from which could be concluded the petitioner's trial counsel failed to perform at least as well as a lawyer with ordinary skill in the criminal law in this area would have performed, or that trial counsel completely failed in conscientiously protecting the interests of his client. Absent such a showing, the petitioner was denied post-conviction relief on the basis of prejudicially ineffective assistance of trial counsel. The alleged errors simply are not supported by the record.

VI.

LACK OF JURY INVOLVEMENT IN THE SENTENCING DECISION DOES NOT VIOLATE THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The petitioner claims the sentencing portion of the death penalty statutes are unconstitutional due to the lack of jury participation in the sentencing decision. This court in Proffitt v. Florida, 428 U.S. 242 (1976), stated: "Judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases." In that case, this court upheld the Florida death penalty statutes which are, in all relevant aspects, identical to Nebraska's. This court specifically stated that such statutes provide all the safeguards required by Furman v. Georgia, 408 U.S. 238 (1972).

Whether sentencing by the court or sentencing by the jury is the preferable system is not the question here. The question is whether Nebraska's system of court-determined sentences somehow violates the appellant's constitutionally guaranteed rights. The petitioner fails to point to any constitutional language mandating jury involvement in sentencing, or explain how this argument can be made consistent with the holdings of Furman v. Georgia, supra. This argument fails to explain why jury sentencing is required now when that notion was rejected in Proffitt v. Florida, supra.

VII.

THE TRIAL COURT COMMITTED NO ERROR IN OVERRULING THE DEFENSE OBJECTION TO THE PROSECUTOR'S COMMENTS DURING CLOSING ARGUMENT.

During closing arguments, the prosecutor stated that the defendants (John Edward Rust and Ronald Ell were being tried jointly) were seeking the protection of the constitution but would not in any way accept any other responsibility or the duties that those constitutional rights entail. The defendant argues that this statement inferentially referred to the

failure of the defendant to testify and explain his defense. It is the state's position that the comments by the prosecutor were in no way directed to or meant to call attention to the defendant's failure to testify in his own behalf.

The defendant in his brief fails to point out that when his objection was overruled and the prosecutor was allowed to continue his statement that the completed statement makes it quite clear that the prosecutor was not by any stretch of the imagination referring to the defendant's failure to testify in his own behalf. Instead, the completed statement clearly shows that what the prosecuting attorney was referring to was the defendant's failure to in any way accept the responsibility to live the life of a law-abiding citizen. The prosecutor was assailing the position of the defendants that they should be acquitted because the victim, by coming to the aid of police, did more than the Constitution required of him.

The prosecutor's train of thought, when viewed as a whole and without the interruption caused by the defendant's objection, clearly did not make reference to the defendant's failure to take the stand and testify on his own behalf. There is not even an oblique reference to his failure to take the stand and the state would argue that his comments were in no way improper and that the court properly ruled upon the defendant's objection. It is our continued belief that the trial court did not commit reversible error on this point.

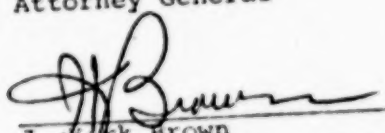
## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THE STATE OF NEBRASKA,
Respondent,

By PAUL L. DOUGLAS
Attorney General

By 

J. Kirk Brown
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
Tel: (402) 471-2682

Attorneys for Respondent